DOCUMENT RESUME

ED 089 406 EA 005 993

TITLE	NOLPE Conference Proceedings, November 1968.
INSTITUTION	National Organization on Legal Problems of Education, Topeka, Kans.
PUB DATE	Nov 68
NOTE	59p.; Papers presented at National Organization on Legal Problems of Education Annual Meeting (14th, San Diego, California, November 13-15, 1968)
AVAILABLE FROM	National Organization on Legal Problems of Education, 825 Western Avenue, Topeka, Kansas ($1.00, plus $0.10 postage)
EDRS PRICE	MF-$0.75 HC-$3.15 PLUS POSTAGE
DESCRIPTORS	Civil Rights; Conference Reports; Contracts; Court Cases; *Defacto Segregation; *Doctoral Theses; Dress Codes; *School Law; *State Church Separation; *Student Rights; Teacher Strikes

ABSTRACT

This booklet contains the texts of speeches given at the 1968 National Organization on Legal Problems of Education conference on school law. The topics covered in the speeches include student rights, dress codes, defacto segregation, education and religious freedom, doctoral dissertations in school law, master contracts, and teacher strikes. (JF)

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NOLPE CONFERENCE PROCEEDINGS

November 13-15, 1968

Vacation Village Hotel

San Diego, California

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CIVIL RIGHTS OF STUDENTS,
LEGAL COUNSEL,
KANSAS ASSOCIATION OF SCHOOL BOARD
Fred W. Rausch, Jr.

My presentation will be in two parts: (1) The position of the American Civil Liberties Union as of September, 1968, in regard to students' rights; and (2) a review of three recent rights cases concerning students' rights against unlawful search and seizure.

I. Position of American Civil Liberties Union regarding students' rights.

The ACLU cites the following amendments to the United States Constitution as authority of the rights I will describe to you later: First, fourth, fifth, sixth, seventh, eighth, ninth and fourteenth amendments. If any of you so desire, I will explain the provisions of each amendment briefly. It is not entirely clear why the sixth and seventh amendments are applicable.

Throughout its statement of policy, the ACLU appears to reluctantly acknowledge the right of school boards and school administrators to operate public schools and to establish policy. Generally speaking, the ACLU seems to feel the students, particularly secondary students, should have a substantial voice in operating the schools and determining administrative policy, and that such students have many rights which cannot be denied them.

What are some of these rights? As I understand these rights, the ACLU feels they are all guaranteed by the aforementioned constitutional amendments, although the ACLU does not cite very many court decisions which support its allegations. This leads me to conclude that most of these alleged rights have not been so declared by the courts, or if they have been so declared by the courts, the ACLU has failed to cite the cases. Following is a list of nine (9) basic rights, some of which I may discuss briefly a little later: (1) freedom of expression and communication - learning materials, forms, student publications, school communications, restrictions on political thoughts, loyalty oaths, inquiries by outside agencies, freedom of religion and conscience, prayers, Bible reading, sectarian and holiday observances, religious movies and religious instruction;. (2) freedom of association - extra curricular school activities and outer school activities; (3) freedom of assembly and the right to petition; (4) student government; (5) student discipline - right of due process and role of police in secondary schools; (6) personal appearance; (7) freedom from discrimination; (8) rights of married and/or pregnant students; and (9) academic freedom and education.

Editor's note: At this time Mr. Rausch went into a detailed explanation of ACLU's position on several of the aforementioned students' rights. These will not be reprinted here but may be found in a pamphlet entitled "Academic Freedom in the Secondary Schools", published by the American Civil Liberties Union, 156 Fifth Avenue, New York, N.Y. 10010, dated September, 1968.

II. Searches and Seizures

What are the rights of a student who is suspected of having a gun, a knife, a bomb, narcotics or some other prohibited item in his school locker or dormitory room? What can school authorities do? What can the police do?

Under what conditions, if any, may school authorities or the police unlock or forcibly open and search a student's locker or dormitory room? What evidentiary value have the items picked up as a result of such a search? Some recent cases will give us some answers.

People v. Overton, 20 NY Second, 360. In this case three detectives of the Mt. Vernon Police Department who had obtained a search warrant, went to the Mt. Vernon high school. The warrant directed a search of the persons of two students and their lockers. The detectives presented a warrant to the Vice Principal, Dr. Panitz, who sent for the two students, one of whom was the defendant, Carlos Overton. The detectives searched them and found nothing. A subsequent search of Overton's locker, however, revealed 4 marijuana cigarettes.

The trial court found that the search warrant for searching the locker was defective, but found that the principal not only had the authority but did in fact consent to the search of the defendant's locker. The defendant's motion to suppress the evidence found in the locker and to dismiss the information was denied and an appeal was taken therefrom to the supreme court of the state of New York. The New York Supreme Court held that the search of a locker used exclusively by the student could not be justified by consent of the Vice Principal, that the purported consent was not binding upon the student and that in the absence of competent evidence upon which a conviction could be upheld, the information should be dismissed. There being no other evidence in the record to support a conviction, the information against the defendant was ordered dismissed.

From this ruling of the New York Supreme Court the case was appealed to the New York Court of Appeals, the highest court in the state of New York. In reversing the decision of the New York Supreme Court, the Court of Appeals held that where the Vice Principal was obligated to inspect a student's locker when he learned of the suspicion of the detectives that something unlawful was in the locker, that such interest, together with the non-exclusive nature of the locker to which the Vice Principal had the combination, empowered him to consent to the search by the officers.

In its opinion the New York Court of Appeals went on to say that it is axiomatic that the protection of the Fourth Amendment to the United States Constitution is not restricted to dwellings. A depository, such as a locker or even a desk is safeguarded from unreasonable searches for evidence of a crime. The court went on to state "Dr. Panitz, in this case, gave his consent to search Overton's locker. The dissenting opinion suggests, however, that Dr. Panitz's consent was not freely given, because he acted under compulsion of the invalid search warrant. If this were the case, his consent might be rendered somewhat questionable. However, Dr. Panitz testified that: 'Being responsible for the order, assignment, and maintenance of the physical facilities, if any report were given to me by anyone of an article or item of the nature that does not belong there, or of an illegal nature, I would inspect the locker.'

"This testimony demonstrates beyond doubt that Dr. Panitz would have consented as he did regardless of the presence of the invalid search warrant.

"The power of Dr. Panitz to give his consent to this search arises out of the distinct relationship between the school authorities and students.

"The school authorities have an obligation to maintain discipline over the students. It is recognized that when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.

"It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to anti-social behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high

school age increases the danger. Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated.

"When Overton was assigned his locker, he, like all other students of Mt. Vernon high school, gave the combination to his home room teacher, who, in turn, returned it to an office where it was kept on file. The students at Mt. Vernon are well aware that the school authorities possess the combinations of their lockers. It appears understood that the lock and the combination are provided in order that each student may have exclusive possession of the locker vis-a-vis other students, but the student does not have such exclusivity over the locker as against the school authorities. In fact, the school issues regulations regarding what may and may not be kept in the lockers and presumably can spot check to insure compliance. The Vice Principal testified that he had, on occasion, inspected the lockers of students.

"Indeed, it is doubtful if a school would be proper in discharging its duty of supervision over the students, if it failed to retain control over the lockers. Not only have the school authorities a right to inspect, but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detective's suspicion, he was obliged to inspect the locker. This interest, together with the non-exclusive nature of the locker, empowered him to consent to the search by the officers."

The Overton case was then appealed to the United States Supreme Court which handed down a decision on October 28, 1968. I have not been able to obtain a copy of said opinion and have only a news release of the Associated Press which reads as follows: "The Supreme Court directed New York courts today to consider whether the Vice Principal of a Mt. Vernon high school should have let police search a student's locker for marijuana cigarettes.

"With its ruling, the high court set aside a 5-year youthful offender sentence imposed on the student, Carlos Overton, 17. The sentence has been a probationary one.

"The Vice Principal, Adolph Panitz, permitted police to search the locker in December, 1964. The officers had a warrant. Four marijuana cigarettes were found in Overton's coat pocket in the locker.

"New York courts have been divided on whether the search warrant was a valid one. The last court to rule, the State Court of Appeals, said whether the warrant was valid or not, authorities had a right to search the student's locker.

"This is the issue that will now have to be resolved by the state court.

"The American Civil Liberties Union questioned Dr. Panitz's authority to consent to the search on the boy's behalf. In reply, Carl A. Vergari, Westchester County District Attorney, said a teacher must have 'prerogatives necessary to keep potentially lethal drugs out of the hands of students.'

"Justice Hugo L. Black dissented, saying the conviction should have been confirmed by the supreme court."

Until such time as I can obtain a copy of the United States Supreme Court's opinion and study same, I cannot speak with any degree of certainty as to exactly what the court ruled and its reasoning therefor. Apparently the court has stated,

however, that a principal or other school authority may not consent on a student's behalf to the search of the student's locker, even where the school has the combination of the locker and the student does not have the exclusive use of the locker. It appears that the case has been remanded to New York for the main purpose of determining whether or not the search warrant was valid. If the search warrant was valid, then apparently the conviction will stand, whereas if the search warrant is found to be invalid, the conviction will probably be set aside.

The second case I want to visit with you about is the case of People v. Cohen, 292 NYS 2D 706 (New York). In this case the facts indicate that Hofstra University authorities were apprehensive about the use of marijuana in some of the school's dormitories. These authorities arranged with the police for a survey of the dormitory premises. Accompanied by two university officials, the police entered the dormitory room of one of the defendants without announcing their purpose and without a search warrant. There was no evidence that anyone, including the defendants, was in the room at the time of the entry, since neither the police nor the university officials observed the defendants entering the room. What motivated the police and school authorities was the odor in the hallway leading to the room and information previously provided by an unidentified informant about one of the defendants. Once inside, the incriminating evidence was observed and seized. However the record is silent on the point as to whether any of the boys who were present in the room were or had been smoking marijuana. It is apparent that there is no evidence that the evidence, if any, would be removed and destroyed, nor was there a lack of time within which to obtain a search warrant. The defendants moved to quash the evidence that had been seized.

The court granted the motion, indicating ".....it is probable that the main spring of the police action was a suspicion that a crime was being or had been committed. Suspicion, however, is not an alternative to, nor a substitute for, probable cause that a crime was or is being committed. In the circumstances of the case such as this, an entry and search is lawful if there was consent or if the search was an incident to a lawful arrest. No claim was made that there was an express consent to the entry.

"Can consent be implied? It has been argued that a student impliedly consents to entry into his room by university officials at any time, except at late hours. This contention is not supported even though there may be circumstances under which entry is permissible; but these circumstances are not present here, nor does the court intend to catalog the occasions which might permit entry into the room of a college student.

"The police and the Hofstra University officials admitted that they entered the room in order to make an arrest, if an arrest was warranted. This was, in essence, a fishing expedition calculated to discover narcotics. It offends reason and logic to suppose that a student will consent to an entry into his room designed to establish grounds upon which to arrest him. Certainly, there can be no rational claim that a student will self-consciously waive his constitutional right to a lawful search and seizure. Finally, even if the doctrine of implied consent were imported into this case, the consent is given, not to police officials, but to the university and the latter cannot fragmentize, share or delegate it.

"Was the search an incident to a lawful arrest? Obviously, no. The police had no grounds for lawful arrest when they entered the room. Indeed, it was admitted that if the evidence had not been found when they entered the room, no arrest could have been made. Simply stated, the arrest was dependent upon finding the fruits of the unlawful search.

"The practice of some students (and the number is far less than is generally believed) who use narcotics and who take trips to the outer world instead of to the library, is appalling enough. But this egregious stupidity and calloused irresponsibility should not be matched by the wanton invasion of constitutional liberties ....."

"The fact is that the police action here offended the constitutional rights of the defendents. .... It seems self-evident that the dormitory room of a college student is not open for entry at all times for all purposes. ..... University students are adults. The dorm is a home and it must be inviolate against unlawful search and seizure ....."

The above decision was rendered by the district court of Nassau County on July 29, 1968. It is not known at this time if said case has been appealed and if so, the results of any such appeal. Suffice it to say that what the supreme court said in the Overton case in regard to the searching of student's lockers has been said by a New York State Trial Court in regard to the search of a student's dormitory room, i.e. that such a search cannot be made without the consent of the student or without a valid search warrant and that the consent to such a search must be made by the student himself and cannot be made by a school official.

The third and last case which I will discuss is the case of Bumper v. State of North Carolina, 20 L. ED. 2D 797, decided by the United States Supreme Court on June 3, 1968. In this case, at the defendant's trial in North Carolina State Court, he was found guilty on a charge of rape, a capital crime under North Carolina law, and of two charges of felonious assult. As to the rape charge, the trial court, following the recommendation of the jury, imposed a sentence of life imprisonment. The Supreme Court of North Carolina affirmed (270 NC 521, 155 SE 2d, 173.) Throughout the litigation in the state courts the defendant pressed the claims that (1) his constitutional right to an impartial jury was violated when the prosecution was permitted to challenge for cause all prospective jurors who stated their opposition to capital punishment, and (2) a rifle introduced in evidence against him was obtained in a search and seizure violative of the 14th and 15th amendments to the United States Constitution. Upon appeal, the Supreme Court of the United States reversed. In an opinion by Mr. Justice Stewart, defendant's claim under (1) above was rejected on the ground that he had adduced no evidence that a jury, selected as was the one in his case, is necessarily biased as to a defendant's guilt, this holding expressing the view of five members of the court. On the other hand, defendant's claim under (2) above, was sustained on the ground that the search resulting in the seizure of the rifle, was unlawful because defendant's grandmother, the owner of his home, had consented to the search only after one of the participating police officers claimed to have a search warrant, this holding expressing the view of seven members of the court.

Some of the salient facts in this case are as follows: The petitioner lived with his grandmother, Mrs. Addie Leath, a 66-year old Negro widow, in a house located in a rural area at the end of an isolated mile-long road. Two days after the alleged offense but prior to the petitioner's arrest, four white law inforcement officers - the county sheriff, two of the deputies, and a state investigator - went to this house and found Mrs. Leath there with some young children. She met the officers at the front door. One of them announced "I have a search warrant to search your house." Mrs. Leath responded, "Go ahead, and open the door." In the kitchen the officers found a rifle that was later introduced in evidence at the petitioner's trial after a motion to suppress had been denied.

Thus the issue presented to the court was whether a search can be justified as lawful on the basis of consent when that consent has been given only after the

official conducting the search has asserted that he possessed a warrant. The court held that there could be no consent under such circumstances, stating "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact, free and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the state does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all..... We hold that Mrs. Leath did not consent to the search, and that it was a constitutional error to admit the rifle in evidence against the petitioner ..... Because the rifle was plainly damaging evidence against the petitioner with respect to all three of the charges against him, its admission at the trial was not harmless error."

What the Bumper case appears to point out is that consent to search must be voluntarily given and before a consent can be voluntarily given the person giving the consent must be informed that he has the right to refuse to consent and any consent given upon a belief that a search could be made pursuant to a warrant whether or not consent was given, would be invalid.

In conclusion, these cases appear to hold that (1) a student's locker cannot be searched without his free consent or without a valid search warrant; and (2) a student's dormitory likewise cannot be searched without his free consent or without a valid search warrant; (3) that consent cannot be given for the student by a representative of the school district or university; and (4) consent, if given, must be free and not based upon a belief that consent might as well be given because if it is not given the search can be lawfully made anyway; and (5) that any evidence or a confession obtained as a result of an illegal search and seizure cannot be used against an accused.

A REVIEW OF A "HAIRY" SUBJECT

by

Dr. K. D. Moran

Boards of education in the United States have the obligatory right to make and administer reasonable rules and regulations for the orderly progression of the schools under their jurisdiction.[1] Courts down through the years have hesitated to interfere with the judgment of a board of education in the interpretation of legally adopted policies, rules and regulations[2] on the grounds the court has no obligation to substitute its wisdom for that of a board.[3] Therefore, it is apparent the courts are interested only in whether the rules and regulations adopted by a board are reasonable and not arbitrary or oppressive. Many cases have been litigated in the past in regards to reasonableness of board rules. This discussion will explore one facet of this rule of law, that facet being student grooming; more specifically, haircuts, beards and other hairy subjects of some recent vintage.

In the past twenty years, some 10 cases[4] have been reported dealing with controversies arising out of school board policies concerning student hair styles, dress or grooming, if you will. These 10 cases may well be the forerunners of a deluge of cases already being primed in the hinterland at this very moment.

In the main, all 10 cases in question concern themselves with the same problem and have similar circumstances and conclusions: a boy or group of boys violates an established rule of the board of education concerning length of hair, the wearing of beards or mustaches; the individuals are sometimes warned of the violation prior to suspension; the individuals are either suspended or expelled for not conforming to the established rule; a suit is filed naming the principal, superintendent or school board as defendant; the case is heard before a judge and a verdict is returned in favor of the school board. Some trial cases are appealed to a higher jurisdiction, but invariable the verdict is sustained and that verdict is simply that boards of education have the right to prescribe reasonable rules and regulations that insure an orderly progression of the academic and disciplinary decorum of the school.

Various reasons have been promulgated by the plaintiffs justifying their long hair, beards or other improper manifestations of hairy appendages. Their reasons range from professional necessity to those concerned with the individual's right to dress and dictate his own appearance as he pleases. Not one jurisdiction acknowledged the individual's right to this personal privilege and, indeed, some courts failed to even mention it in their opinions. The basic rule of law, that of the board's right to make reasonable rules and regulations has almost always been upheld to the utter dismay of the plaintiffs.

The courts have used similar reasoning in justification of their verdicts in both Leonard and Ferrel. In Leonard, the court said:

> We are of the opinion that the unusual hair style of the plaintiff could disrupt and impede the maintenance of a proper classroom atmosphere or decorum. This is an aspect of personal appearance and hence akin to matters of dress. Thus, as with any unusual, immodest or exaggerated mode of dress, conspicuous departures from accepted customs in the matter of haircuts could result in the distraction of other pupils.

In Ferrel, the court stated:

> That which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right . . .

Generally speaking, courts have listened favorably to testimony that presents a clear picture of disruption allegedly caused by long hair, beards or dress. Clearly, when the educational process is disrupted, interferred with or curtailed, courts will almost automatically render a verdict in favor of the board of education without any other evidence or line of reasoning. As typified in Akin:

> The parents of the majority of the students who are clean-shaven enjoy the right to have their youngsters educated in a classroom setting free of disturbances and distractions. Expert opinion established that it is injurious to the educational process when a deviation on the part of one student leads to the lack of acceptance on the part of many students. Good study habits and proper conduct on the part of youngsters constitute attributes which are beneficial . . . and far outweigh the restraint on the peripheral right to grow a beard . . .

The line of thought manifested by the courts in relation to long hair and beards has also been extended to cover short skirts and other exaggerated forms of dress including the "granny dress." However, some courts have dealt more tolerantly with other aspects of grooming such as the wearing of freedom buttons. In Burnside v. Byars, 363 F 2d 744, (Mississippi, 1966), the court upheld a group of students who wore freedom buttons. The Court of Appeals held:

> The Negro school children who attended an all Negro high school wore the 'freedom buttons' as a means of silently communicating an idea and to encourage the members of their community to exercise their civil rights. The right to communicate a matter of vital public concern is embraced in the First Amendment right to freedom of speech and therefore is clearly protected against infringement by state officials . . . Regulations which are essential in maintaining order and discipline on school property are reasonable . . . it appears that the presence of 'freedom buttons' did not hamper the school in carrying on its regular schedule of activities; nor would it seem likely that the simple wearing of buttons unaccompanied by improper conduct would ever do so.

However, the court in Tinker v. Des Moines School District, 258 F. Supp. 971, (Iowa, 1966), thought differently when students wore black arm bands to school. In its decision the court said:

> Officials of the defendant school district have the responsibility for maintaining a scholarly, disciplined atmosphere within the classroom. These officials not only have the right, they have an obligation to prevent anything which might be disruptive of such an atmosphere. Unless the actions of school officials in this connection are unreasonable, the Courts should not interfere. The Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities . . . A subject should never be excluded from the classroom merely because

it is controversial. It is not unreasonable, however, to regulate the introduction and discussion of such subjects in the classroom . . . It was not unreasonable . . . for school officials to anticipate that the wearing of arm bands would create some type of classroom disturbance . . . On the other hand, the plaintiff's freedom of speech is infringed upon only to a limited extent. They are still free to wear arm bands off school premises.

Other courts have had a tempering effect upon school boards in the area of grooming. In Valentine v. Independent School District, 191 Iowa 1100, 183 NW 434 (1921), the court upheld a student who refused to wear the traditional cap and gown at the school's graduation ceremonies. In Mitchell v. McCall, 272 Alabama 604, 143 So 2d 629 (1963), the court ruled that a student did not have to wear a gym suit because it offended plaintiff's modesty. Two other cases, McCaskill v. Bower, 126 Georgia 341, 54 SE 942 (1906), and Matheson v. Brady, 202 Georgia 500, 43 SE 2d 703 (1947), were dismissed by the courts because technical pleading requirements were not met. This merely meant that the plaintiffs had not exhausted the administrative due process procedures open to them.

By and large, however, and especially in the last few years, the courts have tended to frown upon extreme grooming styles that violate the dress policy of a board of education.

It might be suspected that the courts would uphold college administrators if they tried to enforce some type of grooming code. In the past, colleges have been upheld in cases dealing with the establishment of rules and regulations concerning housing and off-campus eating establishments.[5] Recently, colleges have been involved in cases dealing primarily with campus demonstrations and the courts have seen fit to say in effect that college administrators have the right to . . .

> invoke its disciplinary powers in this instance (which) need not be entirely bottomed on any published rule or regulation . . . it is an inherent power that the school administration authorities have to maintain order on its campus, and to afford students, school officials, employees and invited guests freedom of movement on the campus and the right of ingress and egress to the school's physical facilities. We agree with the students that the doctrine of 'in loco parentis' is no longer tenable in a university community; and we believe that there is a trend to reject the authority of university officials to regulate 'off-campus' activity of students. However, that is not to say that conduct disruptive of good order on the campus should not properly lead to disciplinary action.[6]

Akin upheld the right of a teacher to wear a beard. If college students are judged to be adult, in the sense of the word they are not high school students or juveniles, Akin might stand as precedent in favor of allowing college students to dictate their own dress code. However, since no reported case has been uncovered to test this hypothesis, the merits of the argument are purely academic at this juncture.

Lawyers are well accustomed to the adversary system of argument whether it be in the courtroom or the living room. The question at hand lends itself quite readily to argument by those who seek a liberalization of state control over the individual. Recent United States Supreme Court decisions have enhanced the liberal movement in the field of civil rights and criminal procedure, not to speak of widening the glare of the public spotlight on problems of the juvenile. Long haircuts have drawn their share of supporters from American society to counterbalance the mandate of the state court system, boards of education, school personnel and segments of the general public.

The opposite side of the argument maintains that the boards "cannot validly exercise their police powers to force students to cut off their hair except in extreme instances . . ."[7] and that courts should uphold the state's decision, which is made manifest by boards of education, "only in the most unusual circumstances."[8] Supporters of long hair have not had the greatest of luck in the past few years. However, pressures seem to be building around the country in some quarters to justify making long hair and other hairy subjects a federal question. Presumably this tack is being taken because advocates of the freedom of appearance movement see the federal courts as their savior.

The arguments of supporters for long hair fall within defined categories. By forcing a child to cut his hair under duress, the following constitutional guarantees appear to have been violated:

1. the First Amendment as applied to the states by the Fourteenth Amendment
2. due process
3. equal protection under the law
4. right of privacy
5. principles laid down in In Re Gault, 87 S. Ct. 1428 (1967)
6. cruel and unusual punishment as stated in the Eighth Amendment
7. abridgment of liberties guaranteed in the Ninth Amendment, and
8. fundamental liberties "recognized to come within the penumbra of freedoms guaranteed by the Bill of Rights"[9]

The wearing of long hair or the adornment of the body with other accouterments not in vogue with the general public, has been associated by the general public with a minority of our population whose entire existence is focused on rebellion, demonstration, anarchy, or what have you. The young people who embrace these fads, if you will, loudly and most vociferously defend their right to appear in public as they might individually or collectively wish. To them, long hair is symbolic speech which is guaranteed by the First Amendment. In Davis, the court said concerning the issue of symbolic speech, that long hair expressed nothing. It does represent something, however; a hippie, a Beatle fan, a folk singer, a member of the "mod" or younger generation if nothing else. The long hair and wild clothes are their "badge," their freedom buttons, the wearing of which was upheld in Burnside as symbolic speech. The court said in Tinker:

> An individual's right of free speech is protected against state infringement by the due process clause of the Fourteenth Amendment. . . . The wearing of an arm band for the purpose of expressing certain views is a symbolic act and falls with the protection of the First Amendment's free speech clause.

The court forbade the wearing of arm bands but upheld the contention that the arm bands were symbolic speech. This decision is amusing but also tragic. The court reminded plaintiff that his freedoms were infringed upon only to "a limited extent."

The court in Davis made a feeble attempt to wiggle out of this dilemma and hedgingly said:

> Even if the wearing of long hair is assumed to be symbolic expression, it falls within that type of expression which is manifested through conduct and is therefore subject to reasonable state regulation in furtherance of a legitimate state interest.

How can black arm bands or freedom buttons be any more a manifestation of symbolic speech than the wearing of long hair? Possibly it is because you can take off the arm bands or buttons when school is let out - hair you can't, unless you wear a wig as urged by the court in Ferrel.

Symbolic speech is very much apparent in our society: the flag salute, clenched fists raised high above the head while standing on a platform, folded hands on the lap, silence, frowning, grinning, crying, pouting, sculpture, abstract signs, FORD, and other "real" symbols of all kinds, ad infinitum. These symbols generate little heat. But long hair, the most outspoken of all the examples of symbolic speech, apparently signifies nothing in the mind of the court. It is apparent to those who champion liberal interpretations of individual liberties the court is missing the point on this question. The popular standard of the day will not accept any reasoning concerning this question other than the line of thought promulgated by the majority of the citizenry that long hair represents something that "could disrupt and impede the maintenance of a proper . . . atmosphere or decorum."[10] In Davis, the court mysteriously and backhandedly alluded to possible disturbances by long-hairs when it stated that the wearing of long hair "was a gross deviation which could lead to . . . 'dysfunction in the social adjustment of children.'" This borders on insanity! It is ludicrous at best. At any rate, long hair at this juncture of time and space is not recognized as symbolic speech even though it fairly deafens you to look at it!

In his article "The Personal Appearance of Students," Reeves maintains the act of forcing children to cut their hair violates the due process clause of the United States Constitution. He cited 14 Kansas Law Review 403 which stated that the exercise of police powers traditionally has violated due process in four ways:

1. where legislative objective is not permissible
2. where fundamental rights are infringed
3. where a statute, though directed to a permissible objective, shows no substantial relation of means to its end, and
4. where the statute is arbitrary, unreasonable or oppressive

Reeves maintained that the school is trying to impose its social standards on children in the guise of discipline and is in effect saying, "if you don't like the rules of the game, go play somewhere else." Apparently this is the rule by which the game is played if you succumb to the argument that since very few standards for admission to the public schools are written into the statute books school officials can make up such rules and regulations, arbitrary or not, as they go along, feeling safe and secure knowing that the state courts will uphold them. This, in itself, is to some a violation of due process. Education is not a right, although some argue it is a political right. Apparently education is a privilege to be earned by conforming to the rules and regulations set down in the form of dress codes by boards of education, usually adopted arbitarily without any other voice being heard. In this day and age, can we afford to deny the privilege of education to those who wear long hair or short skirts? Isn't this a much larger crime?

If a child plays the game of education by the rules and is forced to cut off his hair in order to attend class, is it possible that by so doing the state has acted arbitarily, unreasonably and oppressively and that a "substantial relation of means to an end has not yet been shown and that such regulation, therefore, violates the student's liberty under due process"[11] when he goes home after school? We take for granted that the "Old Jack Seaver rule,"[12] as substantiated in Douglass v. Campbell, 89 Arkansas 254, 116 SW 211 (1909), which allows teachers to stand in loco parentis to children coming and going from

school is a fair doctrine when properly applied. But, by what stretch of the imagination can the state logically conclude that the school's discipline is being threatened by a mere child who is safe at home and under the supervision of his parents?

In some areas, long hair is not the exception, it is the rule. By forcing children to conform to dress codes and other such rules, school personnel are forcing adult standards not in keeping with the times on youngsters who have a right, if only a child's right, to participate in fadism. You have participated, I have participated, we all have or are currently participating in some social fad. This action is justified by adult society under the general heading, "we know best what is best." A statement comes to mind concerning this point and it can be found in Sophocles' Antigone. Creon's son, Haimon, is pleading with his father to spare his true love from death. Creon said, "You consider it right for a man of my years and experience to go to school to a boy?" Haimon replied: "It is not right if I am wrong. But if I am young, and right, what does my age matter?"

Curtailment of youthful hair styles by adult society is seen by some as a very real danger to further encroachment of personal rights in the name of the state. May not someday a student's rights be precluded when he fails to laugh at his teacher's jokes?

The constitution guarantees equal protection under the law. It is argued that the children who wear their hair long are singled out and classified as undesirables. If this be the case, is not this very act unreasonable and arbitrary? In Leonard, plaintiff was characterized as "a concientious, well behaved and properly dressed student." Is Leonard an undesirable? Some think this accusation smacks of "McCarthyism" of the 1950's. Can it be said that all long-haired students are potential trouble makers that could "disrupt and impede . . . proper decorum" in the classroom? If this be true, is not the very act of classifying them because of their long hair unreasonable and arbritary and therefore a violation of the equal protection clause? If not, it is clearly guilt by association and that violates something!

Long hair growers claim their right of privacy has been violated when the board forces them to cut their hair. In Griswold v. Connecticut, 381 U.S. 479 (1965), the court struck down an anti-contraceptive law as an invasion of privacy. The reasoning of the court, as exemplified in the decision written by Justice Goldberg, found that the use of contraceptives was a "fundamental" right as found in the Ninth Amendment. This amendment reads:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

This form of privacy, as defined in Griswold, is not spelled out in the United States Constitution, but can be construed to be a sub-right which is based on other clauses and amendments. If this be true, certainly other such rights are to be found lurking within the context of those sage passages just waiting to be enumerated.

Under the principles found in Griswold, parents apparently have the right to control the attire and the rearing of their children as a fundamental freedom guaranteed by the Ninth Amendment. In Davis, however, the issue of grooming was not found to be "fundamental" enough. The court said:

> . . . while the right of privacy may be so sacred as to be 'fundamental,' the same certainly cannot be said for the 'right of free choice' of grooming.

Grooming isn't spelled out in the constitution; neither is the use of contraceptives or the freedoms given to the free choice of the use of contraceptives. Supporters of long hair fail to see any significant difference between the two "free choices." They maintain that the state has no right to circumvent and inhibit parents' control of their children by substituting its (the court's) wisdom for that of the parents unless the welfare of the state or of the child is at stake. Davis said that grooming was not "fundamental" enough to be included within the same context as Griswold; however, is it fair to require that any right as guaranteed by the Ninth Amendment has to be found in any particular clause or amendment in the constitution? Supporters of long hair think not, and vehemently protest this dichotomy of logic. Might not there be sleeping somewhere in the limbo of abstraction other sub-rights not expressly enumerated in the constitution? And might not these sub-rights be construed as a valid extension of an individual's right to privacy in the same context as is the use of contraceptives in the bedroom?

To supporters of long hair, the free choice argument is fundamental to their case and they fail to see why some questions are resolved under this principle while others are not. Certainly the privacy of the bedroom is fundamental to all married (and unmarried?) couples; is not the personal right to regulate how one looks in public or private equally valid? The courts have repeatedly said no, emphatically!

The illogic of denial of free choice is manifested in Davis and Ferrell when the court said: the mere wearing of long hair could lead to "gross deviation(s)" or a "dysfunction in the social adjustment of children." It could also lead to disruptions in the school or classroom which might lead to some curtailment of educational goals and impede the proper atmosphere or decorum found in the typical school. No case required defendant to prove that the discipline of the school or the morals of the children were impaired by students wearing long hair. In Zachry, the long-hairs were dismissed from school, but the students who perpetuated the disruption (short-hairs) were not punished to the same degree. No other proof was exhibited by defendant to substantiate its claim; indeed, none was solicited. Supporters of long hair insist, as does the American Civil Liberties Union, that proof must be established showing some gross misconduct or disruption in the orderly decorum of a school before dismissal of students with long hair can be justified.

Some say that long hair is not the rule and can not be the exception. If this be true, who is at fault? In Ferrel the long hair fad had been prevalent in the school for more than three years and was accepted by everyone until a "disruption" occurred that gave school authorities the opportunity to vent its displeasure and enforce its grooming policy. Topping off this fiasco, as shown in Zachry, is the fact that students wearing short hair instigated the disruption!

Some people maintain that the school should be less concerned with unorthodox hair lengths and more concerned with why they are turning out so many orthodox minds.[13] What about independent thought? Are not schools dedicated to training youngsters who can objectively analyze a problem and arrive at sound conclusions on their own? If schools conscientiously try to teach this principle, should they consciously expose themselves as hypocrites by forcibly choking off overt manifestations of independent thought reflected in long hair? Or does this social problem point out the glaring truth that the educational system in this country could stand some revision from top to bottom and that youths do have legitimate gripes concerning the establishment.

Chris Argyris mentions in a number of his books concerning personality and organization that whenever workers express discontentment in their labor or actively engage in informal groups to change the system, the employer increases the administrative controls to stifle the rebellion. The workers then increase their agitation in reaction to the increased pressure of additional rules and regulations. The similarity here is clear.

If long hair is a symbol of rebellion in the eyes of the beholder, would it be sufficient to say "that rules governing student appearance should not be justified as an exercise in obedience and discipline, conducted by educators who want to keep all their ducks in a row."[14] Should not proof be exhibited prior to administrative action to initiate dismissal to substantiate any disruption and disorder before the screws are tightened to curtail a possible overt rebellion? If Argyris is correct, dismissal or administrative disciplinary action of some kind will not solve the problem; it will only perpetuate it.

Supporters of long hair and other liberal tendencies maintain that either suspension or expulsion of students who violate grooming codes are unreasonable and arbitrary. They claim that due process has been violated, that symbolic speech and privacy have been denied, and that cruel and unusual punishment has been administered. Whether these arguments are valid or not apparently does not deter the court in rendering a decision in favor of school boards. The ACLU advocates a case by case approach to the problem with adequate proof of breaches of discipline given to the court.

In Re Gault has outlined procedural steps to be taken by authorities prior to placing juvenile cases before the bar. Supporters of long hair and others argue that Gault applies to the question at hand. The trend in this country is to outline procedural due process in dismissing students from school. If such procedural steps are not followed by the school's administration, reinstatement by the courts could occur. This technique of dismissing litigation from the court's docket has long been practiced and can work both ways. Advocates of long hair insist that courts have failed miserably when they resort to enforcing strict interpretations of technical pleading procedures to dispose of suits challenging board rules.[15] If boards of education were required to follow Gault in handling long hair dismissals and were required to show proof of violations of school discipline before students were expelled, such problems might quietly fade away. The burden of proof must be placed in the lap of the administration and the board more forcibly if the individual's rights are to be protected to any degree as guaranteed by the United States Constitution.

There must be alternatives to the remedies imposed by boards of education and by the courts to the grooming problem. Suspension or expulsion is a drastic step which should be preceded by careful analysis of each particular case. Certainly if no warning were given to students to correct their hair length before expulsion, the action might be deemed arbitrary and unreasonable. Education today is too important to be denied to any child without due process. Mere failure to obey all of the rules of the game should not preclude a child's education. "Every dog is entitled to one bite," as the saying goes. We as representatives of adult society should not say to a youthful offender, "cut your hair or go to jail!" We should not apply out-dated principles as found in Pugsley v. Sellmeyer, 158 Arkansas 247, 250 SW 538 (1929), to contemporary problems. What sort of relationship can be found between long hair in 1968 and transparent hosiery, low-cut dresses or talcum powder used as a facial cosmetic in 1929? Are not we out of step with the revolution concerning legal rights of youth as manifested in Gault, and indeed the revolution itself?

It is suggested that there are three alternatives to the long hair problem and others of a similar grooming nature. These alternatives could be listed as:

1. comformity to the legal principles of due process as found in Gault
2. a case by case approach to each grooming question as advocated by the ACLU, and
3. expulsion from school to be supported by tangible proof showing a disruption in the school's discipline and decorum

One can hardly argue successfully that school boards do not have the power to make reasonable rules and regulations to support the efficient management of public schools. In the same vein, courts usually will support only

reasonable rules promulgated by prudent school boards. This is really not the question at all. The question arises from a belief by some that they have the exclusive right to appear in public in such a way that pleases their own conscience, extreme examples notwithstanding, for long hair or short skirts seem to be the mode of fashion today and do not represent extremes in any sense of the word to young people. Nudism, however, would be an example of an extreme grooming practice. The practice of nudism and nudist camps are protected, however, as personal liberties and by due process, at least in Tennessee.[16] The naked truth of the matter is nude people can roam the enclosed countryside; but this is a different story quite apart from bare bottoms in the classroom.

Expulsion from the classroom of today's schools, because of adherence to current fashions, is thought by those young people who conform to the style, to be arbitrary, unreasonable, oppressive, and in violation of a host of personal liberties which are directly or indirectly spelled out in the federal constitution. It is not always the right of the school board that is questioned in expulsion cases; it is the arbitrary manner in which the rules were formulated and carried out that bothers these young people. They want a voice in policy formulation. As a minority group (in not all cases or localities as attested to in Ferrel) the oppression by the majority is likened to the Sunday bluelaws in this country. The wearing of long hair is a matter of personal discretion and conscience; the same argument is used for the abolition of bluelaws. In West Virginia State Board of Education v. Barnett, 319 U.S. 624 (1943), Justice Jackson said that mere existence of a state interest which is "substantial and important, as well as rationally justifiable" was not sufficient in itself to trample individual conscience. Such freedoms can be infringed when "grave and immediate danger(s)" exist. What are the grave and immediate dangers of wearing long hair? Maryland Representative Daniel Carroll said on August 15, 1789: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of government."[17] What is now a trickle of oppression might well turn into a raging torrent at some later date!

Although the analogy of long hair and Sunday bluelaws might not be appropriate, the subject of a minority conscience certainly is. Majority views are most certainly wrong at times, but the rules of the game are dictated by the majority and in very clear language. David McAllister, a delegate to the 1887 National Reform Association Convention put it very well:

> . . . those who oppose this work now will discover, . . . that if they do not see fit to fall in with the majority, they must abide the consequences, or seek some more congenial clime.[18]

It is vividly apparent that long hair advocates are fighting a losing battle and will have to pay the consequences for their indiscretion. This is the way it is, and quite possibly, the way it ought to be. Long hair supporters are so frustrated in their fight that some of them say all board members who support grooming codes that call for short haircuts are bald!

All must agree, however, that arbitrary actions of local administrators and school boards must be watched very carefully. If school officials were bound by the principles of Gault in every case where expulsion or suspension were imminent, a better form of justice might prevail. At least the expulsions wouldn't come as a complete surprise to parents as it does in some cases now. Preliminary hearings, right of counsel, records and transcripts, go a long way to protect children from over-zealous administrators and school boards. This procedure might lower the incident rate of expulsion dramatically, too!

If the courts were to judge each case of the nature in question here on its individual merits and demand documented proof of disturbances and violations of the school's academic and disciplinary decorum, many cases would receive a better taste of justice than they are now receiving. The use of prior breaches of discipline found in other schools could not be used as evidence justifying the necessity for grooming codes in another school, as in Davis.

Hypothetically speaking, what would happen to grooming codes and their administration if long hair became an overwhelming "badge" of the majority? Obviously they would be rescinded and others adopted to take their place. Would this mean no short-haired students would be permitted to attend class? How would all of this be justified to students and parents who have suffered traumatic experiences under the old rules? To be sure, there is a rule of law to cover this contingency with a logical explanation.

In parting, has anyone thought of the child who receives the order, "cut your hair or don't come back to school!" What if he doesn't come back and thereby violates the compulsory attendance laws. Would he be guilty of two law violations? Where is the justice in this course of action? Would the school then be a party to aiding and abetting a juvenile offender?

Quite possibly adult society should be more introspective in regards to the examples they are setting for the young people of this land. When youngsters see their parents and other adults wearing long hair, hair rollers in the grocery store, short shorts on a busy street, slacks at a PTA meeting and fat, middle aged matrons with thigh-high skirts, they become confused, especially when adult society slaps them down for following in their footsteps for something they are much better equipped to handle. It is also confusing when the Nehru jacket is condoned as a stylish fashion, as is the lace that goes with it. But long hair, which is one of the ingredients of the mod-style as much as the lace and collar, is forbidden. It seems apparent that adults should get their stories straight!

FOOTNOTES

1. McLean Independent School District v. Andrews, 333 SW 2d 886 (Texas 1960); Detch v. Board of Education, 145 W. Va. 722, 117 SE 2d 138 (1961); State ex rel Baker v. Stevenson, 27 Ohio 2d 223, 189 NE 2d 181 (1962); Board of Education v. Bently, 383 SW 2d 677 (Ky. 1964); Munter v. Gross, 248 NYS 2d 717 (N.Y. 1964); State v. Ferguson, 95 Neb. 63, 144 NW 1039 (1914); Sutton v. Board of Education, 306 Ill. 507, 138 NE 151 (1923); Valentine v. Casey Independent School District, 191 Iowa 1100, 183 NW 434 (1921).

2. State v. District Board of School District #1, 135 Wis. 619, 116 NW 232 (1908).

3. Ibid.

4. Akin v. Riverside Unified School District Board of Education, 262 ACA (no. 1), 187 (Calif. App. Crt., 1968), 68 Cal. Rpt. 557 (1968); Davis v. Firment, 269 F. Supp. 524 (La. 1967); Leonard v. School Committee of Attleboro, 212 NE 2d 468 (Mass. 1965); Ferrel v. Dallas Independent School District, 392 F. 2d 697 (Texas 1968); Zachry v. Brow, Civil Action #66-719 (Ala. 1967); Blackwell v. Issaquena County Board of Education, 363 F 2d 749 (1966); Burnside v. Byars, 363 F 2d 744 (Miss. 1966); Tinker v. De Moines Independent Community School District, 258 F. Supp. 971 (Iowa 1966); Mitchell v. McCall, 273 Ala 604, 143 So 2d 629 (1963); Matheson v. Brady, 202 Ga. 500, 43 SE 2d 703 (1947).

5. Gott v. Berea College, 156 Ky. 376, 161 SW 204 (1913); Pyeatte v. Board of Regents, 102 F. Supp. 407, aff'd 342 U.S. 936 (Okla. 1951); People v. Wheaton College, 40 Ill. 186 (1866); Webb v. State University of New York, 348 U.S. 867 (1954).

6. Buttney v. Smiley, 281 F. Supp. 280 (Colo. 1968).

7. Clifford Reeves, "The Personal Appearance of Students - The Abuse of a Protected Freedom," Alabama Law Review, 20:104, Fall, 1967, p. 104.

8. Ibid.

9. Ibid., p. 104 ff.

10. Leonard, supra.

11. Reeves, op. cit., p. 109.

12. Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

13. Mary Anne Raywid, "The Great Haircut Crisis of Our Time," Phi Delta Kappan, 48:150, December, 1966, p. 154.

14. Montfort S. Ray, "A Student's Right to Govern His Personal Appearance," Journal of Public Law, 17:151, 1968, p. 174.

15. McCaskill v. Bower, 126 Ga. 341, 54 SW 942 (1906); Matheson, supra.

16. Roberts v. Clement, 252 F. Supp. 835 (Tenn. 1966).

17. Warren L. Johns, Dateline Sunday, U.S.A., Pacific Press Publishing Association, Mountain View, California, 1968, p. 141.

18. Ibid., p. 69.

CIVIL RIGHTS OF PUPILS

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I should like to begin by briefly reviewing four civil rights cases which have been decided in the past few years. In State v. Wiggins, 158 S. E. 2d. 37 (North Carolina, 1967), the supreme court of that state upheld the constitutionality of a statute which prohibited picketing of a school. In another case, a board rule barring membership in a fraternity was ruled valid. The closed noon hour has been recently upheld against a claim that such a board policy constituted a violation of students' civil rights. And there is at least one case in which a board rule prohibiting students from driving to school has been held valid.

There have been a number of cases involving the legal rights of married students. Let me cite these cases in a summary fashion.

First, marriage alone is an insufficient basis for excluding from the privilege of public school attendance, a pupil who would otherwise be eligible to attend. (Nutt v. Board of Education, 278 P. 1065, Kansas, 1929; McLeod v. State, 122 So. 737, Mississippi, 1929). It should be noted that in the Nutt case, the plaintiff had become pregnant out of wedlock. Notwithstanding this fact, the court held that the facts did not justify exclusion of the mother from school after the child was born.

Many of the Attorneys General have cited the two cases above in ruling that marriage alone is insufficient to bar public school attendance.

Can a married student be temporarily suspended from school? Here the courts are divided. In State v. Marion County, 302 S. W. 2d. 57, the Supreme Court of Tennessee upheld validity of a board rule which temporarily suspended a married student from school attendance. However two recent Texas cases have reached the opposite conclusion. In both Carrollton-Farmers Branch Independent School District v. Knight, 418 S. W. 2d 535, and Anderson V. Canyon Independent School District, 412 S. W. 2d. 387, the Court of Civil Appeals of Texas knocked down board rules providing for temporary suspension of married students.

The courts are also divided on the question of suspending married students from participating in extracurricular activities. Most courts have upheld the validity of board policies in this area, on the basis that married students have accepted greater responsibilities, requiring their full attention. (Kissick v. Garland, 330 S. W. 2d 709, Texas, 1958; Wilson v. Abilene, 190 S.W. 2 406; Board of Directors v. Green, 147 N.W. 2d. 854, Iowa, 1967; Stevenson v. School District, 189, N.E. 2d. 181). However, in Mesick v. Cochrane, 103 N.W.2d. 569, Michigan, 1960, a majority of the court, although declaring the issue moot, voted against the board exclusion rule.

An interesting case may go to trial in Columbus, Ohio. In the situation there, the board has demanded that a married student complete high school work in evening school. The usual tuition would be waived, but the student would not be associated with other students in the same grade level in other school activities. It is possible that the evening school work would require a slightly longer period of time to complete the remaining high school credits. The ACLU is investigating the situation and a case may be filed.

Since most compulsory attendance statutes make school attendance an obligation of parents, the question has arisen as to whether school attendance is compulsory upon married students. In the three cases found on this question, it has uniformly been held that marriage emancipates a minor from parental control, and hence frees the minor from the compulsory attendance statute. State v. Priest, 27 So. 2d. 173, Louisiana, 1946; In re Goodwin, 39 So. 2d. 731, Louisiana, 1949, In re Rogers, 234 N.Y.S. 2d. 172. There is dictum in State v. Gans, 151 N.E. 2d 709, Ohio, 1958 that this is not necessarily so. The question also arises as to the effect of a compulsory attendance statute which places the attendance responsibility upon some civil official such as an attendance officer.

Can a diploma be withheld on the basis of cheating on an examination? In the only case which I have seen, the Supreme Court of Kansas held that the board rule and regulation did not clearly provide failure as the penalty. (Ryan v. Board of Education, 257 P. 945).

There are a number of other cases proceeding through the courts in the area of pupil civil rights -- we can expect to hear more from this in the next few years.

DE FACTO SEGREGATION: 1968 LEGAL SITUATION

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It is important at the outset to set the framework for the following presentation. The purpose is to analyze the existing situation relative to "de facto segregation." No attempt will be made to evaluate the wisdom either of the actions which have been reviewed by the courts or of the reasoning offered by the courts to support their holdings. Also, predictions as to the future course of the law will be avoided. The single goal is to synthesize the current status of the law -- what the law is. What the law should be, or what it may become in the future is not to be treated.

"De facto segregation" is a term which only recently has entered the vocabulary of America. It has, however, in a relatively few years become generally accepted by commentators and courts alike as referring in the public-school context to a situation where the students in a school building are overwhelmingly Negro and where this situation came about through no governmental requirement or encouragement. The term is used in contrast to "de jure segregation", which describes the pattern of racial separation which prevailed prior to 1954 uniformly in seventeen states and the District of Columbia and in four other states on a local option basis. In these jurisdictions, state constitutions and/or statutes expressly provided that Negro students be placed in schools different from those housing white students. When the United States Supreme Court in 1954 "conclude [d] that in the field of public education the doctrine of 'separate but equal' has no place . . . [and that] separate educational facilities are inherently unequal", the court ruled out forever de jure segregation, and the country was to be faced with two types of de facto segregation.

Various kinds of schemes used in the South to "desegregate" the formerly de jure segregated schools have created a type of de facto segregation which is completely different legally from that outside of the South. Entirely different bodies of law as of this moment relate to the problems of school districts in the South as regards the mixing of the races, and to school districts outside of the formerly de jure segregated states.

The current law for formerly de jure jurisdictions is that it is necessary to break down completely all aspects of the old dual system -- both as to actual mixing of races and as to community assumptions that a school is "Negro" or "white" -- before there can be a constitutionally equal opportunity to obtain an education regardless of race. This summarizes the "affirmative duty" obligation of school authorities for the "de-de jure" type of "de facto" segregation (which is not the focus of this paper).

As of the present there stands only one direct judicial holding that school districts have an affirmative duty to correct racial imbalances not of government's making. [Some dicta to this effect were offered by the Supreme Court of California in 1963, but implications have not been subsequently clarified. Also, a District of Columbia federal district court opinion in 1967 touched on the point as part of a complicated case.] That one ruling came from a federal district judge whose 1964 decision was not appealed. On the other hand, over the period of the last five years the courts of appeals of four federal circuits have expressly not found an affirmative duty for school boards to reduce de facto seg-

regation per se. As recently as the 1967-1968 term the Supreme Court of the United States has declined to review such holdings. I'll come back to these cases later.

It is important to recall that when the Supreme Court struck down de jure segregation in public schools in 1954, the intent was that any governmental action which had separated the races would have to be corrected or, at least, cease to be enforced. Thus, any action by a school board to gerrymander school attendance lines or to follow different policies for transfers of white students would be a basis for corrective action. The key legal case along these lines came from New Rochelle, New York. This was a long drawn out situation, extending over a period of many years. The court proceedings, which came as a climax to the community controversy, also were quite complicated and extended. The break came in the decision of Federal District Judge Kaufman in January of 1961 when he found that as a matter of fact the board of education in New Rochelle had realigned certain school district boundaries in the past and had before 1949 permitted transfers of white pupils, but not of Negro ones, living within the area of the school under controversy (this school was 93% Negro). Based on this finding of fact (and strongly reprimanding school authorities) Judge Kaufman followed the procedure of the United States Supreme Court in Brown and ordered the school board to present to the court a plan for desegregation of the school. Aspects of the case were eventually appealed to the door of the Supreme Court, which declined to review.

Actually, of course, the New Rochelle case was one of surreptitious de jure segregation. The situation was not solely the result of a neighborhood school plan and housing patterns. I must emphasize the finding of the facts of gerrymandering and discriminatory transfers.

As noted previously, courts of appeals in four federal circuits have held to the view that if a neighborhood school policy is utilized throughout a school system, and if the boundaries are drawn on the same criteria throughout the district, and if transfer policies are non-discriminatory in nature, and if transfers are non-discriminatorily administered, then there is no further duty upon a board of education under the common law or under the federal Constitution to provide an education whereby Negro and white children can mingle in appropriate numbers. The first case so to hold in a federal appellate court was from Gary, Indiana, in 1963. There the district court and the court of appeals examined in detail the factors which the school board had used in establishing school boundary lines -- factors such as density of population, distances traveled, and safety. The district judge held that the law did not require "a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, . . . [to] be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the District is populated almost entirely by Negroes or whites . . ."

Shortly after the Gary decision, the Court of Appeals of New York enunciated for the first time through the voice of a court of last resort within a state the legal principle that a local school board has an implied power to correct racial imbalance if it so desires. The court took pains to point out that it was not answering the question of whether there was an affirmative constitutional obligation to take action to reduce de facto segregation. It emphasized that it was considering the question, "May (not must) the schools correct racial imbalance?" The court's opinion relied heavily on the fact situation, which involved zoning for a new public school where the zoning was found to be not "forced solely by racial considerations." The court posed and answered negatively the question,

"Does an otherwise lawful and reasonable districting plan for a newly instituted school become unlawful because it is intended to, and does, result in an enrollment which is one-third Negro, one-third Puerto Rican, and one-third non-Puerto Rican white?" This was the first venture of a high state court into this area, and the court tread lightly in terms of keeping its statements narrow.

Subsequent to this case the Court of Appeals of New York has extended the law markedly in relation to the elimination of de facto segregation along two lines. Both are based on the fact that the Board of Regents (state board of education) and the State Commissioner of Education have declared as a matter of educational policy that integrated education is better than segregated education. A series of cases has been decided on the reasoning that because this is basically an educational determination, the courts can neither substitute their judgment for that of the educational authorities nor inquire into the social and psychological bases of that educational judgment. Thus, in one line of cases, New York courts have consistently supported directives of the Commissioner to local districts requiring local boards to correct de facto segregation. The second line of cases in New York involves situations where local districts, to improve their educational systems, have voluntarily tried to work out arrangements not mandated by the state-level authorities. These, too, uniformly have been upheld. Included is a plan whereby some children from one school district were bussed into a neighboring school district (with the tuition being paid by the sending district) in order to effect better racial balance within the city and to give the white children in the suburban area an opportunity to associate with Negroes.

The Supreme Court of New Jersey has taken the position that school authorities have the duty to provide equal educational opportunities for all, and that when the elimination of racial imbalance will promote such equality, if local school authorities do not act, the State Commissioner can require them to. Purely local initiative by boards of education to correct racial imbalance for educational reasons has been judicially supported in several other jurisdictions.

Legislatures of a small number of states have passed statutes either requiring or expressly permitting local boards to do something to correct de facto segregation. Two of these state statutes have been contested in the highest courts of the states, and the state courts reached opposite conclusions a few days apart in June of 1967. The Supreme Judicial Court of Massachusetts unanimously upheld a Massachusetts statute related to correcting racial imbalance, whereas the Supreme Court of Illinois, with two dissents, overturned a not dissimilar Illinois statute. The Illinois opinion, however, was not filed. In January of 1968 the Supreme Court of the United States dismissed an appeal from the Massachusetts decision, thereby weakening part of the reasoning of the Illinois majority -- that <u>any</u> racial classification was barred by the Fourteenth Amendment. (Other problems with the statute related to matters not germane to this paper.) After rehearing, on May 29, 1968, the Supreme Court of Illinois by a 4 to 3 vote upheld the statute as within the power of the legislature. The Illinois statute said in part, "As soon as practicable, and from time to time thereafter, the [local school] board shall change or revise existing [attendance] units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race or nationality."

The Massachusetts statute required local school boards annually to submit statistics showing the percentage of non-white pupils in all public schools and in each school of the district. Further, whenever racial imbalance existed in a public school, the local school board would have to prepare a plan to eliminate the imbalance. The term racial imbalance was defined as "a ratio between non-white and

other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve, and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of non-white students in any public school is in excess of fifty per cent of the total number of students in such school." Said the Massachusetts court in sustaining the act, "It would be the height of irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment."

It was noted earlier that there was one standing federal district court holding which came close to declaring de facto segregation per se unconstitutional. (The Washington, D.C. decision of summer, 1967, I'll discuss subsequently.) In this case, decided in 1964, the Board of Education of Manhasset, an affluent New York suburb, was sued by several Negro minors claiming that they and the members of their class were discriminated against by being racially segregated from other children in the public schools of the district. The facts were that 100% of the Negro elementary school children were contained in one school separate and apart from 99.2% of the white elementary school children. Further, the number of children in the "Negro" school was only 166, whereas the other two elementary schools contained 600 and 574 students respectively. The school district had continued a long-standing rigid neighborhood school policy, and there was no proof that there had been any abuse of the companion policy not to permit transfers under any circumstances. The judge found that "on the facts of this case, the separation of the Negro elementary school children is segregation. It is segregation by law -- the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's inpenetrable attendance lines amounts to nothing less than state imposed segregation." The court, in buttressing its decision further, found that the plaintiffs were injured by the segregation. The court noted marked differentiations in socio-economic levels and in both achievement and intelligence quotients between students in the predominantly Negro school and students in the all-white schools. Regrettably from a clinical legal point of view, but happily for the Negro plaintiffs, the school board decided not to appeal this decision. It abolished the Negro school and reassigned the Negro pupils.

In another case a federal district court in Springfield, Massachusetts, in dealing with a complicated fact situation, in its opinion stated, "There must be no segregated schools." On appeal, the Court of Appeals for the First Circuit expressly struck out this statement. By the time of the appeal, however, the politics of the matter had become complex. The Court of Appeals found that the school board was making efforts to correct imbalances and that if it were able to complete what it had started, the courts would not be called upon to resolve "what is, at best, a doubtful question of constitutional law."

In a widely publicized 1967 Washington, D.C., case, Circuit Judge Wright, sitting as a trial judge, ordered extensive changes related to race in the school system. He was careful, however, not to rule out per se bona fide de facto segregation. In his words, "The basic question presented is whether the defendants, the Superintendent of Schools and the members of the Board of Education, in the operation of the public school system here, unconstitutionally deprive the District's Negro and poor public school children of their right to equal educational opportunity with the District's white and more affluent public school children." His answer was affirmative. It is exceedingly important to note the linking of a socio-economic factor with the race factor in this case.

The court examined in great detail (135 pages) factual points related to expenditures, facilities, and teachers. He found a zoning pattern and teacher segregation to be de jure segregation and therefore unconstitutional. He found many inequalities which were not rationally explainable in his view. He found that the "track" system of ability grouping, which had brought to national fame the defendant superintendent of schools, stigmatized, by inappropriate aptitude testing procedures, early in their lives children in the lower socio-economic group, which group happened to be predominately Negro. He concluded that "even in concept the track system is undemocratic and discriminatory . . . Any system of ability grouping [even if the tests used were more valid] which, through failure to include and implement the concept of compensatory education for the disadvantaged child or otherwise, fails in fact to bring the great majority of children into the mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar." The board of education declined to appeal the decision and refused to allow the superintendent to appeal. He then resigned, and is appealing on his own, as is one member of the board. He is supported by the American Association of School Administrators in his view that the court went too far into educational policy matters in its far-reaching decree as to remedies, and is opposed in his view by the National Education Association. (The intriguing relationship to the case of the AASA and the NEA is not relevant to the law of de facto segregation, so will not be dealt with here.)

Another emerging aspect of the area of de facto segregation relates to teacher assignment -- assigning Negro teachers to predominantly Negro schools and white teachers to predominantly white schools. In the South, where this had been the official practice under de jure segregated systems, the courts since 1965 have been requiring that steps be taken to desegregate the faculties as well as the students. However, as indicated earlier, the law for the South is different than for the North due to the legal necessity of breaking down the former dual school system. The question of forced assignments of already employed white teachers to de facto segregated schools has precipitated much controversy in professional and political circles. The first case to reach a high court dealing directly with this matter was that decided by the Supreme Court of Kansas in July 1967. The issue was somewhat narrow. It was the question of whether the Board of Education of Kansas City could be compelled to transfer teachers on a basis of race in order that the faculties be better integrated. The Board of Education, supported by the Kansas City Teachers' Association, declined to make such involuntary transfers. The Supreme Court of Kansas sustained the school board's posture. A general anti-discrimination statute in Kansas was found not to apply except regarding hiring, and there the board was proceeding legally in filling vacancies without regard to race. It is important to emphasize that this was not a case of the school board's desiring to move the teachers on the basis of race to get a better balance, but was a case of the school board's not wanting to act. The question was could it be compelled to act, not could it be stopped if it proposed to act. The latter question has not, as of this date, been adjudicated.

A final case from Pennsylvania treats many of the preceding points, plus that of the possible authority of special administrative agencies charged with responsibilities related to race relations. Last fall the Supreme Court of Pennsylvania found that the Pennsylvania Human Relations Commission did have the authority to order a school district to do something to reduce de facto segregation even though the neighborhood school pattern would be affected. The court held that for the Commission to invoke its authority it was not necessary to find that the school district had intentionally fostered and maintained segregation, only necessary to find there was in fact an imbalance. The court agreed with the observation that a "neighborhood school, which encompasses a homogeneous racial and socio-economic grouping, as is true today, is the very antithesis of the common school

heritage." (The Commission's order for correction of specific acts of discrimination by authorities of the Chester School District had been sustained throughout the three levels of court review. These were sending only Negro teachers and clerks to all-Negro schools, failing to make kindergartens available in sufficient number to accommodate Negro children living in Chester, and permitting the physical conditions of all-Negro school buildings to be inferior to that of other school buildings in the system.) The key questions for the highest court in Pennsylvania were whether a general order regarding de facto segregation could be issued by the Commission and "whether the record supports the Commission's finding that the neighborhood school system as applied in Chester violates the Pennsylvania Human Relations Act." The court answered both parts affirmatively.

It is necessary to re-emphasize that the foregoing presentation has been an effort to describe the law as it stands now. I have avoided predictions as to what it will be and preachments as to what it should be. I have eschewed any bending of judicial decisions to fit sociological, political or moral argumentation. My assignment was to be an analyst, not a prophet or an advocate.

EDUCATION AND RELIGIOUS FREEDOM

By Warren L. Johns

"Statism" subverts the church to the political purposes of the state. "Clericalism" makes civil power the puppet of church enterprise. Either form of church-state union weakens government, cheapens religion, and degrades individual dignity.

Historic perspective influenced Constitutional framers to guarantee United States citizens religious liberty through a First Amendment forbidding laws leading to "an establishment of religion or preventing the free exercise thereof." Thomas Jefferson recognized a "wall of separation" between church and state. The Supreme Court of the United States sees this same "wall" and has suggested a position of "neutrality" for the state in matters of religion --- rejecting both advocacy and hostility.

I. ESTABLISHMENT CLAUSE:

The Establishment Clause prevents the state from passing "laws which aid one religion, aid all religions, or prefer one religion over another" and "tax in any amount, large or small ... levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[1] In practice, the government cannot use its taxing power to finance religious practice including religious education in parochial schools. Conversely, the majority or the minority cannot use the machinery of the public school to preach or practice religion.

Prayer. It is unconstitutional to require a prayer exercise in a public school even though the prayer is non-sectarian and students could be excused from participation. The offending recitation read as follows:

> Almighty God, we acknowlege our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country.[2]

Bible Reading. It is unconstitutional to prescribe the recitation of the Lord's Prayer or regular Bible reading in the public school. The test is:

> What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. ...to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances or inhibits religion.[3]

This does not preclude the study of the Bible for its literary and historic qualities and study of religion when presented objectively as part of a secular program of education.

Evolution. The Arkansas statute forbidding teaching the theory "that mankind ascended or descended from a lower order of animals" in public schools was struck down by the United States Supreme Court on November 12, 1968, because "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence" and the "law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the biblical account, literally read."[4]

In the Court's view, this is possibly consistent with its rationale in the Schempp case rejecting religious exercise in the public school but allowing for the study of Scripture as a matter of history or literature -- providing that evolution would be studied as alleged "scientific" theory. Unless the Creation account of Genesis be offered equal time with Darwinian supposition, practice in the public school could run afoul of the Court's own warning in Schempp that a State may not establish a religion of secularism in the sense of affirmatively opposing or showing hostility to religion and thus preferring those who believe in no religion over those who do believe.

Taxpayer standing. Since 1923, a single Federal taxpayer has lacked the "standing" to challenge the constitutionality of a Federal Statute where the taxpayer claimed a legal interest based solely upon the payment of tax.[5] The taxpayer was barred from using the Court as a forum to air a "generalized" grievance. It also meant that a taxpayer lacked the legal tools to effectively object to government funding of religious enterprises.

That has all changed since June 10, 1968, when with a single dissenting voice, the Supreme Court ruled that a taxpayer has standing in the Federal Court to raise the Establishment and Free Exercise issue where Federal money is being channeled to parochial schools for textbooks and instructional materials.[6]

The Court reasoned that "standing" can be determined by whether the party invoking the jurisdiction of the Federal Court has a personal stake in the outcome of the controversy and whether the dispute touches upon legal relations of the parties having the adverse legal interest. The requisite personal stake is present where both the:

1. Taxpayer attack is limited only to Congressional spending power and
2. The spending power violates a specific constitutional limitation.

Since the religious liberty clauses of the First Amendment constitute a specific constitutional limitation, the "personal stake" of the protesting New York taxpayers clearly existed.

Flast did not repudiate Frothingham but refined its scope so that the "standing" barrier would not be raised when First Amendment religious liberty cases were at issue. Flast did not decide whether the law in question was being administered in violation of the First Amendment but simply that taxpayers had the standing to raise the question in court.

II. FREE EXERCISE CLAUSE

While most taxpayer concern relates to direct government financing of religious enterprises in violation of the Establishment Clause, the Free Exercise side of the Constitutional coin deserves equal attention. While care has been taken to keep religion out of the public schools, the survival of the church school is being threatened. Arguments can be made that the Free Exercise Clause guarantees equal individual option to seek an education either with or without the fourth "R" of religion. But financial realities are eroding this option.

Church school faculty salaries are lower; equipment and buildings are not always competitive; curriculas are more restricted; tuitions skyrocket; and enrollments often decline. The church school parent is supporting the public school with his taxes. Since the Establishment Clause prevents "religion" in the public school, conceivably the Free Exercise Clause should guarantee the equal option of attending the church school. Yet the tax base could reach a level that would prevent even the

most affluent from retaining this option for a religious education. Because of this threat to the survival of church schools, the Court has been sensitive to the Free Exercise issue.

Compulsory public school. Nearly fifty years ago the Supreme Court struck down an Oregon statute that required all children to attend publicly operated schools. The Court recognized the right of the State to compel school attendance and to establish the curricula requirements in private schools, but it rejected civil coercion that would remove individual option where there was a preference for a private or a church school by the parent or child.[7]

Released time. It is constitutional for a public school to release students to attend religious classes.[8] The Supreme Court emphasized that the people of the United States are religious with institutions presupposing a Supreme Being. When the state encourages religious instruction it follows the best traditions, respects the religious nature of the people, and accommodates public service to individual spiritual need. To hold that by reason of the First Amendment a state may not do this would be to prefer those who believe in no religion, over those who do believe.

Bus rides. Church school students receive police and fire protection; public health services; and street, sidewalk, and sewer maintenance. Deprivation of a public welfare benefit because of enrollment in a parochial school would jeopardize free exercise of religion. When New Jersey reimbursed parents for expenses incurred in busing children to parochial schools, the Supreme Court found the practice constitutional. There was nothing to prohibit

> New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as part of a general program, under which it pays the fares of pupils attending public and other schools.[9]

This procedure was valid even though the "children are helped to get to church schools" and "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets."

Books. The Supreme Court has upheld the right of Louisiana to furnish textbooks without charge to all public and private school students because the State's "interest is education broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."[10] A recent New York law authorizing school districts to loan textbooks to students enrolled in private and parochial schools providing the books were secular and requested by the individual students was also upheld in a decision announced concurrently with the Flast case.

> No funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.[11]

III. GUIDELINES FOR THE FUTURE

Direct government subsidies to church schools is both patently unconstitutional, and impractical. Apart from its illegal infringement of the Establishment Clause of the First Amendment, this direct subsidy of a religious institution offers the surest way to absorb that institution by the State, making it but another agency of government.

Although Dr. Edwin Palmer, president of Citizens for Educational Freedom charges that the United States "discriminates against an education that is God-centered" and that "Government is now squeezing private schools out of existence"[12] the answer is not direct institutional subsidy. Two weeks before the 1968 presidential election

Richard Nixon viewed it as a "tragedy of the first magnitude if tax-supported state schools were to drive private institutions out of existence." Nixon proposed "state-prepared plans for state-administered federal assistance to non-public school children."[13]

Any government plan designed to encourage private education should consider the following guidelines:

1. Seek constitutional refuge under the Free Exercise Clause of the First Amendment.
2. The primary purpose must be to benefit the individual and not the institution.
3. The benefit should extend equally to all students whether enrollment is in a public, private or parochial school.
4. The option for the utilization of the benefit must belong to the student so that the burden will be on the school to compete for enrollment. Thus survival of either private or parochial education would be contingent upon student choice rather than upon government subsidy.

Tax deductions or tax credits for tuitions paid by individuals offered by the government would meet these guidelines and would stand an excellent chance of being compatible with both the Establishment Clause and Free Exercise Clause of the First Amendment of the United States Constitution.

FOOTNOTES

1. Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947).

2. Engle v. Vitale, 370 U.S. 421 (1962).

3. Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963). (Also Murray v. Curlett).

4. Epperson Case, decided by United States Supreme Court, November 12, 1968, reported in Sacramento Bee.

5. Frothingham v. Mellon, 43 S.Ct. 597 (1923).

6. Flast v. Cohen, 88 S.Ct. 1942 (1968).

7. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, (1925).

8. Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679 (1952).

9. Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947).

10. Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S.Ct. 335 (1930).

11. Board of Education v. Allen, 88 S.Ct. 1923 (1968).

12. Religious News Service, p. 19, 10-16-68.

13. Religious News Service, p. 24, 10-21-68.

DOCTORAL DISSERTATIONS IN SCHOOL LAW

by E. C. Bolmeir, Duke University

You will note from the program announcement that several questions are suggested with respect to "doctoral dissertations in school law." I shall rearrange and modify the suggested questions and attempt to answer them briefly as a prelude to our seminar discussion. Five questions to which I shall refer are: (1) Are doctoral dissertations in school law worthwhile? (2) What institutions should sponsor dissertations in school law? (3) Who should teach and supervise research in school law? (4) What should be the requisites of students writing dissertations in school law? (5) How should dissertation topics be determined?

1. Are doctoral dissertations in school law worthwhile? In answering this question, relative values must be taken into consideration. I understand one of the large institutions in California has inferred that the requirement of a dissertation for a doctor's degree should not be absolute. I personally believe the dissertation requirement should not be waived because of the value accruing to the doctoral student and the profession.

(a) The main value derived from the writing of a dissertation is the mastery of research techniques and excellence in writing. Of course such values would not be obtained from shoddy research and writing. Every dissertation should be begun with the intention that when completed it would be publishable. The adequate and well-organized legal resources found in a law library facilitate the development of good research techniques in the field of school law.

(b) A secondary value obtained from the dissertation in school law is the findings of the research. If the research has been thorough and accurate, the findings should be the most reliable obtainable. Moreover the researcher should be the most authoratative on the specific issue researched. Many dissertations in school law could be cited which set forth legal principles which may guide school administrators and others in the performance of their duties.

2. What institutions should sponsor dissertations in school law? It is inconceivable that a dessertation involving case law can be produced without the necessary legal resources. The researcher should have access to a complete law library. The institution with a law school is most likely to possess the necessary physical facilities. In rare instances legal departments and offices outside the educational institution possesses many of the legal resources necessary for research in the field of school law. The value of their resources to the doctoral student would be dependent upon their accessibility.

3. Who should teach and supervise research in school law? Ideally the person to direct doctoral dissertations in school law would be a faculty member who has a good background in law as well as in school administration. If one has a deficiency in either area it would be well to gain the necessary experiences. In some institutions professors from the law schools are helpful by participating in seminars and serving on the doctoral committees. Legal experts, without a background in school administration, might be inclined to be overly-legalistic in their viewpoints of school law research.

4. What should be the requisites of students writing dissertations in school law?

(a) At least a master's degree or the equivalent thereof should be required before a student begins work on a doctoral dissertation. Major study, with some experience, in the area of school administration would be desirable.

(b) A basic course in school law, stressing techniques of finding and analyzing court decisions, and deriving legal principles therefrom should be pursued before, or concurrently with, the development of a dissertation subject.

(c) An advanced seminar in school law for those who are writing dissertations in school law should be pursued. Constructive criticism from associates at the early stages of research and writing are mutually helpful.

5. How should dissertation topics be determined?

(a) It is desirable for the student to assume responsibility for the selection and planning of a dissertation. Although the professor should not assign the dissertation topics it is proper and desirable for him to throw out suggestions that would generate ideas and enthusiasm, not only to select a topic, but, to develop a tentative outline. A student who is dependent upon the professor in the selection of a topic is likely to be also dependent upon him in writing the dissertation.

(b) Nowadays there are numerous grants for research projects. In such instances it might be proper and necessary for the professor to offer the opportunities to the students in accordance with their qualifications and interests to deal with specific topics.

(c) Too much duplication of topics should be avoided. Otherwise the student would be denied the opportunity of doing original research. Moreover, the duplication of findings would be of little value to the profession.

(d) Although duplication should be minimized, supplementation and coordination of topics would be desirable. For example, a dissertation such as "Legal Status of the Teacher in California" could be duplicated somewhat for each of the other forty-nine states.

(e) In some instances intensive research might be limited to certain periods - such as "Since the Brown Decision," or "During the Warren Era".

(f) The very reason for which we are having this seminar suggests to me a feasible and worthwhile topic for a dissertation entitled: "Practices in Selecting, Directing, and Utilizing School Law Dissertations in Selected Universities."

With the increasing number of issues in school law, and the innovative techniques for researching them there appears to be no limit to the topics for doctoral dissertations. Much research in the area of school law has already been expedited by the use of modern devices. In all probability right now someone may be developing a dissertation with a title such as "The Use of the Computer in School Law Research."

Dr. Hendrik C. de Bruin, Dean
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Notes on NOLPE Short Seminar Presentation on Doctoral Dissertations

Doctoral dissertations in school law should be continued and greatly encouraged, first for the benefit of the type of research experience gained by the individual student.

Students should be encouraged, through research to arrive at their own topic, with the help and guidance of the major professor. Professors should refrain from assigning topics of interest to them and not to the student.

Once a dissertation has been completed, every effort should be made to get it published, in whole or in part, so that the information can be made available to others in the field. For those of us working in areas where no law library is available, I would like to see an organization like NOLPE have on hand dissertation abstracts available to students at institutions like ours doing legal research at the Masters and Ed. Specialist levels.

There are some specific areas that need detailed investigation in the near future. Among these are:

1. The legal status, principles, and procedures involved in the whole area of para-professional workers in education. Some of us are currently planning training programs for this group, and there is a lack of available information.

2. More work needs to be done on the Civil Rights of pupils, when they are entitled to a hearing, defense, etc. before administrative action can be taken. Civil Rights of college students and the legal principles involved should also be investigated.

3. Attention should be paid to the financing of higher education, with special attention to the private schools and colleges.

4. Dissertations should be written in the area of public funds to private and parochial schools, particularly since the Flast v. Cohen case, and the recent Pennsylvania law allowing public funds for private teachers' salaries, instructional materials, and texts.

5. Studies should be conducted on a national level - rather than on four or five small school districts in one state.

6. Research needs to be conducted on the use of people from other academic disciplines as well as joint programs within institutions.

7. Someone should be able to put the language of school law in the language of the lay teacher, so they may use the information collected.

8. Studies should be devised to use other techniques of research other than documentary research, perhaps such things as simulated studies in school law and their effect on administrators and teachers might be used.

In conclusion let me say that some way our organization should help in avoiding duplication of effort on the part of doctoral students writing studies. Great time and effort can be saved if we organize a cooperative attitude between institutions and individuals working on similar areas of investigation.

THE "MASTER CONTRACT" IN PUBLIC EDUCATION */

by Erwin B. Ellmann**

Former HEW Secretary John Gardner recently warned against the habit of educators "debating policy alternatives left behind five years ago." This is a particularly apt admonition in evaluating the so-called master contract as we know it at the present time in public education. When I first became involved with such problems in 1965 with the passage of Michigan's Public Employment Relations Act, the source book presented to me was a revised edition of an NEA pamphlet on professional negotiation, dated July 1965, collecting agreements then in force in different areas of the country. Those were the days when most teacher organizations mountainously labored with school boards to bring forth mice--pious declarations that teaching was a profession, that the teachers recognize and bow down before the board's legal powers, that everybody favors cooperation in principle so long as it doesn't disturb any existing practices, that the parties are anxious to talk to each other but that they can do so only after setting forth in fastidious detail how they are to begin to get started to commence the dialogue. These documents, which were usually only a few pages long, concentrated on how many chairs would be filled on each side of the table, who would call the meetings, and the procedures or instrumentalities for discussion. Rarely was there anything seriously said about substantive terms and conditions of employment of teachers.

Today such documents are as remote and outdistanced as medieval manuscripts. No one can take them seriously. They are curios of an age before teachers joined the revolution of our times. In a few years teachers have made a giant leap forward; they have passed from the stone age to the space age almost overnight. While in different states and communities there have been various rates of progress, the main body of the organized teachers of the country is, I think, moving from appalling naivete to high-geared sophistication. The collective bargaining agreement today in public education is no less detailed, comprehensive and imaginative than in the private sector.

In 1965 the Public Employment Relations Act of Michigan was given immediate effect. We had no "lead time," for both the statute and our competition were upon us. We had quickly to determine our bargaining objectives. There were few models. We borrowed liberally from pioneer contracts negotiated by the NEA in Newark and Rochester and New Haven and by the AFT in New York and Detroit. We appropriated ideas from industrial union agreements where applicable or suggestive. Mostly, we just went into an opium trance and improvised. Within a few weeks after the law became effective we distributed throughout the state a handbook on how to get recognition or certification, how to petition for an election, how to start negotiating, and a suggested model for what might be a first collective bargaining agreement.

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*/ These remarks were delivered before the annual meeting of National Organization on Legal Problems of Education, November 15, 1968 in San Diego, California.

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Instead of a short memoranda in which boards and teachers promised to love the children, we suggested to our units a thirty-five page typewritten document, together with exhibits and attachments, as the bare bones of a contract between the parties. The proposal produced amoung teachers and administrators and MEA representatives a combination of vertigo, nausea and terror. It was too long. It was too complicated. It covered things no teacher had thought about or was interested in. It reiterated gobs of the statute and the rights of organization and negotiation which the Legislature had proclaimed.

Our first master contract may not have been a model of terse English prose but it provided the overnight means for educating everyone as to what the statute meant. It opened bargaining vistas. It suggested negotiable subject-matter. It showed the form and contour of a typical collective agreement. It let teachers see what was meant by negotiable terms and conditions of employment. And it outlined constructive, realistic solutions to some of the problems which teachers long had but did not know how to solve.

The importance of this basic contract can hardly be over-emphasized. It was a written document which could be preserved and referred to later, it was a handy guide which saved creative thought at the local level. It quickly helped get most teachers in most areas of the state thinking along somewhat parallel lines while at the same time encouraging reasonable diversity. For 1966-1967 we circulated a revised and expanded contract version with annotations--pointing out relevant decisions or statutory provisions supporting contract proposals, indicating similar provisions already in effect and giving incidental guidance to the negotiators. The following year the MEA put out a further revision and we are beginning work now on an edition for 1969-1970 with new proposals to keep pace with the rapidly changing scene and needs of public education.

We have eliminated some of the provisions which describe the statute and which were originally included mainly for missionary purposes. But we have not shrunk from seeking contractual commitments from school boards which parallel their statutory obligations, for this can provide us with a choice of remedies -- that is, unfair labor practices or breach of contract. Some of the provisions have become more spare while others have been expanded.

These basic materials have since been sent throughout the country by the Michigan Education Association. We are flattered that they are now being widely imitated. Agreements in Arizona, Indiana and New Jersey, I have recently noticed, contain familiar language, even down to the typographical errors. It is gratifying to discover that persons unknown and maybe yet unborn will, in Justice Holmes' phrase, be "marching to the measure" of our thought. Acknowledging our debt to those who preceded us, we are pleased if we can be of help to those who are just getting into this interesting and protean area. If viticultural allusion in California is not currently amiss, I am sure that all of the toilers in the MEA vineyard are gratified if you can save yourselves work by building on what we have begun.

Current agreements in Michigan run at least 40 or 50 pages and some are twice that size. They contain detailed provisions for the governance of all aspects of the employment relation between teachers, administrators and the board of education. Our bargaining units are all-inclusive but exclude supervisory personnel because of the necessities of our statute. Our conception of bargainable issues embraces everything which can affect the teacher on the job, including design of buildings, parking, restroom, telephone and research facilities. Our master concepts cover all phases of compensation, whether in terms of annual salaries, allowances for extra-curricular assignments, leave provisions, terminal pay or study

allowances. A recent MEA study based on 333 questionnaires actually returned, shows that in most of our districts invidivual teacher contracts are expressly made subject to the master agreement and that binding arbitration of grievances is provided in 133 contracts. Teacher aides or para-professional assistants are encouraged in 88 contracts, 20 explicitly authorize extension of the school year and 121 provide for joint teacher-board consultations on the fiscal problems of the school district. Survey of Selected Data from 333 Education Association Agreements, 1967-1968 (1968). We provide for professional evaluation of both tenure and probationary teachers and seek to safeguard job security against frivolous and irrational board action. You may have noted a recent decision of an arbitrator holding that a high school football coach could not be removed from this special assignment without reasons which were substantial and fairly demonstrated. Board of Education, Warren Consolidated Schools, 250 GERR D-1, June 24, 1968. Our contracts cover problems of student discipline and teacher protection and methods for securing and expanding academic freedom within and outside the classroom. We negotiate a school calendar for the year and the length of the school day, including preliminary and post-liminary activities. A recent study by a University of Michigan group suggests that while the average annual increase in teaching salaries in the years before negotiations was 3% at the B.A. minimum and 3.5% at the M.A. maximum, during the first two years the negotiation process has yielded average increases of 8% and 9% at the B.A. and 11% and 10% at the M.A. Rehmus and Wilner, "The Economic Results of Teacher Bargaining: Michigan's First Two Years" (1968). This last year the increase was 9% at the B.A. and 11% and 10% at the M.A. and our top salary range in Wayne County in the Detroit area is $7,500 at the B.A. minimum to $13,210 at the M.A. maximum in eleven years. Teachers who have increased their salaries some 30% in three years have little doubt as to the value of collective action.

Where bread and butter issues have been laid to rest, local associations are now devoting more time to renovating curricula, to implementing new techniques to cope with inner-city educational problems and are even taking the first cautious steps toward merit pay recognition for outstanding teacher performances. I have no doubt that in the months or years ahead there will be radical re-examinations of the classic teacher salary schedule which sets premiums upon the indiscriminate amassing of graduate credits in education courses that are often worse than worthless and which perpetually consigns the superior teacher to inferior pay if he will not play the school of education game. Indeed, the current indifference or hostility of schools of education to the aspirations of organized teachers may well produce the expected reaction; academic control over professional qualifications will be challenged and public education may yet see the introduction of the "union hiring hall." In the next few years there will also be revaluation of the blind faith reposed in tenure act procedures which, however well conceived, have now, like juvenile courts, become subject to constitutional infirmities. The persistent unwillingness of many school managements effectively to manage will no doubt be subject to corrective pressures at the bargaining table, just as alert managements will insist upon eliminating the dry rot from the ranks.

I will not pause to catalogue the provisions of a prototypical agreement. You can get that by consulting an index. But I would like to consider with you some provisions which seem worthy of the specialized attention of those who are concerned with the legal implications of the negotiation process.

Any workmanlike collective agreement should contain a recognition clause explicitly giving exclusive recognition to the designated organization as representative of all the employees in the bargaining unit for the term of the

agreement. The specialized practices under the California Winton Act and the Minnesota statute are obviously peculiar -- and in my judgment, wholly anomalous exceptions which need not long detain us. I understand that there is a movement to change Minnesota's law in the near future. The persistence with which our hosts defend a statutory monstrosity designed to paralyze action by perpetual competition and debate is, I should imagine, a product of the hot noonday California sun. Having one organization negotiating and administering a contract at one time is desirable from the standpoint of the employer and the employee organization. Under most statutes patterned after the federal law, the duty to bargain, as the Supreme Court has said, is an exclusive one and it "exacts the negative duty to treat with no other." Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683, 684 (1944). This raises the question of the standing of the individual teacher, whether a member or non-member of an association representing all members of the bargaining unit, to make a personal complaint, or to invoke the grievance procedure. It likewise raises the question of the standing of the rejected rival organization to insist upon what it calls "equality of treatment" by the employer.

Our Michigan statute contains an explicit provision that an individual employee may present a complaint or grievance to his employer but assures the association a right to be present at any adjustment and provides that no disposition shall be inconsistent with the collective agreement. An overly cautious reading of this language induced us originally to give contractual confirmation to this individual right. School boards agreed with alacrity and often went out of their way to demand stronger assurances to permit the individual to negotiate quite independently of the bargaining representative. We soon realized that we had been unduly protective of the rights of dissident individuals. The federal law, containing similar statutory language, has been construed not to require an employer to entertain the complaint of an individual employee but only to permit it. Broniman v. Great Atlantic and Pacific Tea Company, 353 F. (2d) 559 (6th Cir., 1965). And there seems little doubt that an employer may contract to confine grievance negotiations to the recognized bargaining representative. In several cases before our Labor Mediation Board we have established the principle that the Association may properly maintain control over its own grievance procedures, that a school board is not required to entertain a grievance submitted by an individual teacher through an outside attorney for a rival organization, Matter of Avondale School District, MLMB Case No. C66 F-71, 1968 Labor Opinions 680, that dues deduction, access to mail facilities and bulletin boards and similar channels of communication may be properly confined to the authorized representative of the bargaining unit. A rejected organization representing a minority has no standing to demand privileges obtained through negotiations by the bargaining representative. Matter of Avondale School District, MLMB Case No. C66 K-131, July 15, 1968, Matter of Melvindale-Northern Allen Park School District, MLMB Case No. C66 F-57, 1967 Labor Opinions 167. Thus, the notion of equality of treatment has been subordinated to the indispensable need to distinguish between the successful organization and the one which has been outvoted. The right of the individual to petition for redress of grievances, in a constitutional sense, no doubt survives. But the constitutional right of petition does not give an individual teacher the right to complain under a contract which specifically confines the grievance procedure to the organization itself.

Whether you are comfortable with this result depends, of course, upon the theoretical preconceptions with which you view the collective bargaining agreement. If it is to be treated as a contract between the employer and the bargaining representative of which the employee is a third-party beneficiary, it is hard

to deny the individual beneficiary the fruits of the agreement regardless of the position of the bargaining agent in the particular situation. On the other hand, if you accept Professor Cox's analogy to a trust, the trust beneficiary is not in a position to override the conscientious decisions of the trustee.1/ The unique aspects of the collective bargaining agreement which have defied easy analysis in the private sector are likely to persist when the government is the employer.

Of course, the problem of reconciling individual and group rights may well be aggravated in the public sector because the employer is not only bound by the provisions of the agreement but by the equal protection and due process clauses of the Federal Constitution. It can be argued, also, that employee associations or unions, given special status by a collective negotiation statute, are wielding a sufficient measure of governmental power to be subject to at least some constitutional limitations. In this context the developing "duty of fair representation" can take on special meaning. In a case arising from Warren, Michigan the contract increased the allowance on the salary schedule for teaching experience performed in other school districts. The Board, when the contract became effective, began paying in accordance with such allowance all teachers newly hired, but refused to grant the same experience credit to teachers already in the system who had come to Warren when a less liberal credit had been accorded. We urged before the chairman of our Labor Mediation Board who was sitting as a private arbitrator, that it would be unconscionable and discriminatory to treat some members of the bargaining unit on a different basis from others, that this would offend the equal protection clause binding upon the board as well as the fundamental obligation of the association to represent fairly all members of the unit. The arbitrator agreed, finding the constitutional obligation overrode what he thought was a contrary provision of the agreement, and awarded approximately $50,000 additional salary to equalize treatment of all eligible teachers. Warren Consolidated Schools, 67-1 ARB ¶8228 (Robert G. Howlett, 1967).

More recently it has been suggested that a "grandfather clause" which relieves existing personnel from burdens or requirements imposed upon others entering the bargaining unit may be subject to the same objection. In private industry it is commonplace for the parties to handle the problems of the old faithful employee by establishing a so-called "red circle rate" which affords special treatment to the individual so long as he is employed but which does not disrupt the general wage pattern in the plant. It is much more doubtful that this technique is available in public employment for a school board, the courts have said, may not pick and choose consistent with the Fourteenth Amendment. Aebli v. Board of Education, 62 Cal. App. (2d) 706, 145 P. (2d) 601, 625 (1944).

The relationship between the public employer and the dissident employee is also the subject of important litigation in our state arising out of the so-called "agency shop" or professional responsibility provisions which we have negotiated in many contracts. As you know, this means that if a teacher does not voluntarily join the association and agree to deduction of dues from his paycheck, he is required to pay an equivalent amount as a represent-

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1/ Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. R. 1, 22 (1958).

ation or service fee, upon pain of discharge from employment. Opposition to such provisions originally came from teachers themselves who rejected "union security" as immoral and unprofessional. After they realized that it took an annual budget of hundreds of thousands of dollars effectively to negotiate and administer master contracts in the State, they began to realize that it was more immoral and unprofessional for teachers to enjoy the vast benefits secured by such contracts without paying their fair share of the cost. Nowhere in the state have we encountered employees offering to work under a salary schedule in effect before a master contract was negotiated or who have disclaimed all the other benefits secured by such a contract. Accordingly, we have taken the position that one who receives the benefits should be willing to participate in the costs of the process which brings such benefits about. Parasitism is not a civil right.

In a landmark case in which the MEA participated, Matter of Oakland County Sheriff's Department, MLMB Case No. C66 F63 (Jan. 8, 1968), 1968 Labor Opinions 1, 227 GERR F-1 (Jan. 15, 1968), our Labor Mediation Board upheld the agency shop in public employment. Thereafter, the Michigan Federation of Teachers, which has about 20 or 25 units in the state compared to more than 500 districts where MEA units are the bargaining representative, sought to challenge the agency shop provision in public education, contending that it was inconsistent with the Tenure Act. So far all such efforts have been uniformly unsuccessful. City of Warren Local No. 1383, International Association of Fire Fighters (Macomb Co. Cir. Ct., No. S67-3311, 1968); Clampitt v. Board of Education of the Warren Consolidated Schools, 256 GERR E-1 (Macomb Co. Cir. Ct., 1968). See also Tremblay v. Berlin Police Union, 232 GERR D-1 (N.H. Sup. Ct., 1968). Our Tenure Commission is facing this problem this very morning in Lansing. We are confident that violation of the collective bargaining agreement by failing to pay a representation or service fee will be upheld as proper cause for termination in public employment just as in private employment.

Even in states which have no negotiation legislation, the right of employees to organize together, to express their views about terms of their employment, and to take cooperative action in their own self-interest is supported by constitutional guarantees. While a few courts are hostile to the whole notion of collective negotiation in the public service, most regard it as permissible even if not mandatory for the employer to deal with an employee representative. See, e.g. City of Fort Smith v. Arkansas State Council No. 38, 269 GERR F-1 (Ark. Sup. Ct., 1968). Where no statutory guidelines exist, there is no reason why the parties themselves may not establish procedures for obtaining recognition, negotiation, resolving impasses, and submitting disputes to third parties for resolution.

Some states, it is true, have no mediation agency or local officials are disinclined to intervene in school disputes. In Hammond, Indiana recently where a dispute threatened and no state assistance was forthcoming, we invoked the aid of the Federal Mediation and Conciliation Service. If, following Maryland v. Wirtz, _____U.S._____20 L. Ed (2d) 1020 (1968), employees of public school districts are engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the federal Fair Labor Standards Act, there is no reason why this national industry should not obtain federal mediation assistance when required. We took the position that the restricted definition of "employer" under the National Labor Relations Act, excluding governmental employers, had no application to the grant of authority to the mediation agency where the word "employer" does not appear.2/ Further,

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2/ Section 202 (d) of the Labor-Management Relations Act, 1947.

the mediation functions of the United States Conciliation Service which were transferred to the FMCS contained no restrictions disabling assistance to governmental employers and employees. The federal authorities indicated a willingness to intervene if state officials would not; in no time Indiana decided it could provide mediation help. Certainly, a contract provision in which both parties consent in advance to cooperate with the FMCS if its assistance is requested by either should provide effective mediation facilities even in states which have lagged in providing them.

There are virtually unlimited possibilities for imaginative and creative contract draftsmanship to fill the lacunae in the statutory scheme or to provide relief not otherwise available. This is true both in states with little or no legislation as well as in a state like Michigan. Indeed, it is important to emphasize that such progress as has been made by Michigan teachers has resulted from their own efforts and not from official gratuity or grace. The statute as it finally emerged was far from being congenial to the MEA but we have learned to live with it. Whenever he has occasion to issue opinions under this statute, our Attorney General acts as if there has been no change in labor-management relations since the last century. Some time ago he opined that it was illegal for public employers to contract to submit disputes concerning the interpretation or application of agreements to the binding judgment of an arbitrator. We ignored this nonsense and went about arbitrating cases. In the same Oakland County Sheriff's case, the Labor Mediation Board upheld such an arbitration procedure and the courts have followed suit.

More recently our Attorney General concluded that boards of education may not stipulate for terminal pay, for reimbursement of tuition for advanced courses in an "in service training" program or to redeem in cash unused personal sick or leave days. We have hundreds of these provisions presently in effect. While we face arguments from such opinions at the bargaining table, we will continue to negotiate these provisions and defend them if need be in the courts. Under a statute which specifically authorizes negotiation of all terms and conditions of employment of teachers, we see no reason for a grudging construction based upon school codes written long before public employment had to become competitive with private industry.

Our Labor Mediation Board, though competent and conscientious, is extremely conservative to the point where, in my judgment, employees are not receiving the protection which the Legislature contemplated they should have. For either ideological or fiscal reasons, or both, our Board, unlike the NLRB, has refused to investigate charges and to render any assistance in their prosecution. It merely provides a tribunal for adjudication, and the charging party has the burden of preparing his case and presenting it, and establishing that the public employer has committed an unfair labor practice. Pre-trial discovery depositions, suggested in the Board's recently announced procedural rules, are apparently unavailable. Accordingly, charging parties are placed under the heavy burden of having to stumble upon evidence in advance or at the hearing or to bear the consequences of dismissal. This problem has become acute in cases arising under the Michigan equivalent of Section 8(a)(3) where an employee is fired or not reappointed because of alleged organizational activities. In Matter of Bullock Creek Board of Education, MLMB Case No. C68 C-16 (July 15, 1968), the Board disclaimed any interest in determining whether there was just cause for the dismissal so long as it was not shown by a preponderance of the evidence that it was motivated by the employee's protected activities. The same conclusion was reiterated in Matter of Clare County Road Commission, MLMB Cases Nos. C67 K-149, C67 K-150 (1968) where arbitrary and capricious action was held in no way offensive to the PERA. 270 GERR B-1 (Nov. 11, 1968).

These cases uncritically import into public employment the traditional NLRB approach that a private employer can discharge for a poor reason or for no reason so long as it is not for union activity. But the Federal Constitution protects the tenured and non-tenured teacher alike from arbitrary, capricious or discriminatory discharge, regardless of the purported reason. Bomar v. Keyes, 162 F. (2d) 136 (2nd Cir., 1947); Johnson v. Branch, 364 F. (2d) 177 (4th Cir., 1966), cert. den. 385 U.S. 1003 (1967), Rosenfield v. Malcolm, 55 Cal. Rept. 505, 421 F. (2d) 697 (1967). We are thus faced with the anomaly that employees can achieve more sympathetic consideration of their grievances and more effective relief in a federal district court under the Civil Rights Act of 1871 than from the administrative agency specially set up and charged with the duty of protecting employees from anti-organizational reprisals. In the federal court extensive pre-trial discovery is of course permitted under the federal rules; the school board members can be required to answer interrogatories under oath, to produce relevant documents and to submit to pre-trial discovery depositions.

When a specialized labor relations agency such as the Michigan Labor Mediation Board, through a series of decisions ends up by practically excising 8(a)(3) from the statute, because it is unwilling to examine the implications of a rule for private employment in the public sector, it does no favor to either party. The employees, it is true, no longer have the advantage of a relatively prompt and relatively economical administrative remedy. They have to make a federal case of what could be a relatively routine proceeding. But the school boards are also faced with the expense of defending themselves in a federal courtroom which is less likely than state officials to be indulgent of state politicians. School board members are also subject to much more severe remedial consequences for not only may a federal judge issue an injunction or direct reinstatement of the employee with back pay, but under the Civil Rights Act there is personal liability for all damages occasioned by acts of defendants under color of law. In the recent case of McLaughlin v. Tilendis, 398 F. (2d) 287 (7th Cir., 1968) the two discharged probationary teachers are each suing for $100,000. It will be interesting to see what the recovery turns out to be. In two cases we have had in Michigan, in one of which suit was begun and in the other merely threatened, settlements provided for reinstatement with full back pay and an award of about 3/4 annual salary for a second year. Whether the burden of such payments, occasioned by the misconduct of board members or their representatives, can be shifted back on the public taxpayers, is a nice question which I leave for future litigation.

We are seeking to have the Michigan Labor Mediation Board alter its exaltation of dry logic over practical realities, but meanwhile perhaps some help can be obtained from additional contract language provided by the parties themselves, such as:

> "In the event of the filing of any grievance under this Agreement or in the event the Association serves written notice on the Board that it intends to file a complaint in behalf of any employee under the Civil Rights Act of 1871, the Board agrees that its members, agents and employees may be subject, upon due notice from the Association, to pre-trial discovery procedures enumerated in the Federal Rules of Civil Procedure, and in accordance with the terms thereof.
> It is further agreed that in any proceeding involving the discharge or non-appointment of an employee for alleged organizational activities, the Board shall have the burden of establishing that its action did not violate the Public Employment Relations Act. Action against an employee which is arbitrary, discriminatory or capricious shall not be deemed to satisfy such burden of justification."

Such a clause may not be the conventional stuff of collective bargaining agreements, but an imaginative draftsman will not want to neglect cat-skinning alternatives.

Another troublesome area where the ingenuity of contract draftsmen is invited involves the failure of employees to report for work. The Holland decision3/ earlier this year marked, I believe, the first authoritive indication that courts will not regard all strikes by public employees as automatically enjoinable. Professor Russell Smith of the University of Michigan Law School, who was chairman of Governor Romney's advisory committee which reviewed possible statutory changes, and who originally was an unconditional adherent of the Taylor Act in New York, has recently joined Theodore Kheel and others in considering a limited right to strike, 268 GERR E-5 (Oct. 28, 1968). The unequal treatment of public and private employees in the same situation would seem to raise profound equal protection arguments under the Fourteenth Amendment. The current review by the U.S. Supreme Court of Mr. Shanker's demand for a jury trial may illuminate this issue. In Michigan we have a final judgment granting a permanent injunction against a strike pending review in our Supreme Court, which will be argued before a court whose personnel has changed in the last few months.

Perhaps before the courts put to rest the "Volstead Act psychology" which has so long afflicted this field, the parties can negotiate more realistic approaches. How could the following provision be regarded as contrary to public policy or subversive of good order?

> The parties agree that upon expiration of the effective date of this Agreement and until there is a new collective bargaining agreement executed by them, the Board will not directly or indirectly seek to compel any teacher to perform teaching duties against his will, will not interfere with the right of any teacher freely to contract or not to contract for his personal services, or to associate with his fellows or to discuss terms and conditions of employment or other matters of concern to them. The Board will not, directly or indirectly, apply for any injunction or court order to prevent or interfere with any failure of any teacher to report for work except to prevent irreparable injury. For purposes of this provision, irreparable injury shall include the consequences of mass violence but shall not include inconvenience or damage which can be measured or compensated for in money. The postponement in the opening of the school year, so long as 150 days of instruction can be scheduled prior to July 1st of any year, shall not constitute irreparable injury.

You may think that this goes too far. But that is the subject of another discussion -- at the negotiating table.

3/ School District for the City of Holland v. Holland Education Association, 380 Mich. 314 (1968).

ARE TEACHERS' STRIKES LEGAL?

by Joseph Hoffman

In the process of deciding whether to enjoin this teachers' strike, the Court must confront the universal problem facing every board of education in this country. The issuance of an injunction here would merit like action in every other district. For this reason, my argument is addressed to the fundamental questions at hand, leaving aside the parochial issues pertinent to this case alone.

Whether teachers' strikes are either legal, proper, or appropriate is one of the root issues of modern life, deeply affecting each and every one of us. It is a problem with implications far beyond the field of labor relations or education and, when stripped of the trappings of labor's militant slogans and government's cliches, it suggests an even more basic question; is the American system of government obsolete?

Permit me to set the issue in its statistical context. One sixth of the total labor force in the United States is engaged in public employment. There are approximately 25,000 School Districts in the United States of which nearly 85% are operated by elected School Boards. Of the 6.4 million local government employees, more than 3.5 million are employed in the schools. Of this latter group, 2.3 million are teachers.

It is sometimes difficult to think of these people as "adversaries". In the first place, they comprise a substantial percentage of our population; they are "of the people". They are the professional individuals who administer and execute the policies of government determined by board representatives elected "by the people". In the exercise of this public service, they are "for the people". Yet, there comes a time when they unite and stand apart from both government and the rest of the population in their own self-interest. In this posture, they justly view themselves not as public servants or professional educators but as "employees" endeavoring to improve their personal lot.

A public employee, like any other citizen in a free and competitive society, has an obligation to himself, his family, and his community to advance his own economic and professional interests. Teachers want and deserve the right to some meaningful form of collective bargaining, which means simply that they want a fair share in the process of educational decision making. Of equal significance, since the community holds them to high standards of professional responsibility, they want to be paid as professionals. Today the average teacher's salary amounts to about $7,000 a year, and only about 6% of all of these professionals are in the $10,000 and above category and "above" rarely exceeds $13,000.

The employer, the School Board, must recognize that these interests are matters not only of economic necessity but of personal integrity. If government on any level is to function properly, it, and not its servants, must take the first giant strides towards honoring its commitments to the public labor force. There is, therefore, an exigent need for progress in the area of government-public employees bargaining. It is encouraging to note that there is substantial progress in this area and significant overhauls of public employment relations are being undertaken throughout this country. Understandably, this is not an easy process, for each concession to the employee represents some equivalent diminution of government power. Unfortunately, the one ominous impediment to this favorable development is the public strike and the fear of it.

Certain militant labor leaders, who see the strike as the be-all and end-all of public employment relations, have focused so intently on this single issue that they are jeopardizing the movement toward a more rational employment relationship in the public sphere. While occasionally a public employees' strike has produced a net short-term gain, its unconscionable use may be eroding every advance the public labor force has or is about to achieve. The fear which the strike has engendered in the public is the principal ally to those in government who staunchly adhere to the status quo without regard to its inequity. Elected officials simply are not going to respond to the fairest employee demands in the face of a public outraged by promiscuous work stoppages.

Now is the time for rationalism, not confrontation. The public strike must be put in perspective and be seen for what it is; an illegal, improper and impossible solution to the problems facing teachers and other public employees.

Beyond its adverse impact on the long-term interest of public employees, the strike will not and cannot be tolerated as an integral and routine aspect of the government's negotiating process. The rights of everyone else, the safety of the community, that massive collection of individual needs we call the public welfare, cannot be regularly disregarded at the expiration of each contract. In this social compact we call democracy there is no room for the commonplace application of anarchy as a means towards achieving even the best of goals.

I take no literary license with the word "anarchy", for how else does one describe a deliberate act of disobedience of the law. It is well settled that a strike by public employees is absolutely illegal. The Legislature and the Courts of this and almost every other jurisdiction have definitely proscribed public employees' strikes. See 31 A.L.R. 2d 1142, Fla. Stat. § 839.221. (See also Detroit v. Division 26 of Amalgamated Assn. of Street, etc., 332 Mich. 237 (1952); Appeal dismissed. 344 U.S. 805 (1952) wherein the Court upheld the constitutionality of a Michigan statute proscribing strikes by public employees.)

My adversary would suggest to you that the right of public employees to strike is one of the fundamental guarantees of our organic law and that therefore these laws may not be constitutionally applied. This argument was articulated in most simplistic terms by the President of the New York City United Federation of Teachers, Albert Shanker:

> "The Court cannot legally tell anyone to work if they do not want to work. This is not a slave State. It is a democracy."

On the contrary, there is not now nor has there ever been a Constitutionally recogized and uninhibited right to strike. In fact, for better than a century after the acceptance of our Federal Constitution, not only strike action but the simple act of banding together to form a union was considered a crime. Modern decisions have since categorized private labor's right to organize for collective bargaining purposes as "fundamental," while holding that the "right to strike," because of its impact on the public interest is highly susceptible to regulation. See for example, International Union, U.A.W.A. etc. v. Wisconsin Employment Relations Bd., et al, 336 U.S. 245 (1945). Some forty-five years ago, Justice Brandeis noted that "neither the common law, nor the 14th Amendment confers the absolute right to strike." Dorchy v. Kansas, 272 U.S. 306, 311 (1922). Even in the great Labor-Relations Acts of Congress which guarantee the right to strike in the private sector, serious restraints are set forth to pro-

tect the public. See § 208, L.M.R.A. ("Strikes, Picketing and the Constitution, Cox, 4 Vand. L.R. 574 (1951).) The concerted work stoppage is simply not a fundamental right in historic terms, and contemporary construction views it as a limited right qualified by the greater public interest. (See Driscoll v. Edison Power & Light, 373 U.S. 221 (1963); Thornhill v. Alabama, 373 U.S. 221 (1963).)

Another labor argument posits that anti-strike laws are tantamount to enforced slavery. While it is true that an individual is free to cease work at any time, every court which has considered the question has held that the Thirteenth Amendment's ban on slavery has no relevance to collective and concerted labor activities. (Western Union v. IBEW, 2F. 2d 993 N.D. Ill. 1924), Aff'd. 6F. 2d 444 (7th Cir. 1925); Lacae 170 v. Gadola, 322 Mich. 332 (1948); State v. Traffic, etc., 2 N.J. 335 (1949); Wisconsin Employment Relation Board v. Amalgamated, etc., 257 Wisc. 43 (1950) cert. granted 340 U.S. 874 (1950); United States v. I.L.W.U. et al., 78 F. Supp. 170 (1948); Southside Hospital v. Davis, 252 N.Y.S. 2d 350 (1964).) These courts have reasoned that the individuals' right not be enslaved is not offended by governmental regulation of collective action which poses a threat to the public welfare. This is in line with common law theories which have long held that what might be a legal activity by one individual can become an unlawful conspiracy when several persons become involved.

It is also settled that the First Amendment guarantee of free speech is not contravened by reasonable limitations placed upon strike action. Mr. Justice Goldberg, one of the foremost exponents of labor's legal prerogatives, in the case of Cox v. State of Louisiana, 379 U.S. 536, 85 S. Ct. 453 (1965) ruled that this protection did not extend to certain labor activities to the same degree as it pertains to actual speech.

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

In sum, the right of employees to strike in the private sector is not founded upon any basic constitutional guarantee and it may be regulated or prohibited in the public interest. Under the present state of the law, the State may, with a fortiori reasoning, either regulate or prohibit the public strike and these laws remain fully consistent with the Constitution.

The next inquiry, compelled by the nature of a democratic society, is whether these laws should be preserved in the best interests of our people. I submit that they should. Anti-strike laws have been rationalized in a variety of ways. Those most frequently articulated are; that the government is supreme and its authority may not be violated; that the public welfare requires that government functions may not be impeded; that the separation of powers doctrine, wherein only the legislature can appropriate funds and most of the subjects of labor negotiations, such as salary scales, tenure, certification, fringe benefits, and others are placed beyond the reach of administrative negotiations by statute, renders board negotiations meaningless.

All of the above reasons are valid to some extent. There are such realities as governmental authority and public welfare.

Under the heading of public welfare, we cannot ignore that the teachers' strike is not against the school board, but against the people themselves. The detrimental impact of a teachers' strike on the children involved aptly drives this point home. The October 21, 1968, issue of the New York Times reported that in interviews with psychiatrists, psychologists and child guidance workers, the consensus was that the recent New York City strike has adversely affected the school children of that City. One specialist after another spoke of such damaging effects as "much higher levels of anxiety and tension", "emotional instability", and "undermining of confidence and respect". As the head of the department of child psychiatry at St. Luke's Hospital put it:

> "It's hardly a constructive lesson. I don't believe the way to teach children about society is to give them as models people who are ignoring not only their needs but also the law."

A research psychiatrist described the child's dilemma as follows:

> "The teacher, a father figure, is thrown off his pedestal. The man no longer has the authority which the child thought he did. This destroys respect for school, community and, in the end, parents, since parents are expressions of authority and society."

I cite the above to give added content to the principle, often labeled by militant labor leaders as meaningless and trite, that a teachers' strike is offensive to the public health and welfare.

Further, our system of government does seriously inhibit the negotiating process since the "employer" is never merely the School Board, but includes as well the people and the legislature. An essential factor in private industrial negotiations is the ability of management to make binding commitments to labor. Most boards of education, including the one represented here, must look either to the legislature or to popular referendum or to both for approval of its budget. The board's power to agree on economic issues is thereby diluted by the legislative or popular right to deprive it of the funds to honor its commitment. This factor, and the statutorily fixed subjects of teacher tenure, certification, pension and disability rights, and other matters of concern, severely limit the board's role as an effective employer negotiator.

Thus, there exists a fundamental difference between public and private collective bargaining which renders the attributes of one inapplicable to the other. There is one further and basic aspect of this difference which renders the public strike wholly unacceptable and inappropriate to our way of life. In the private sector, while the strike is the ultimate weapon of labor, management has equally powerful weapons which make for substantial equality of bargaining power. The employer, at all times, retains the prerogative to go out of business, or to move his business, or to close down some part of it, or to go bankrupt. Labor must use great care in winning its battles, not to lose the war. One need only recall the newspaper strikes in New York of a few years ago and the subsequent loss to that city of several of its finest newspapers and, along with them, huge reservoirs of employment. Government, on the other hand, has no equivalent bargaining power. It cannot move away. It cannot discontinue its services. It cannot go bankrupt. Thus, if the public strike is to be recognized and accepted as an acceptable prerogative of public employees, government will no longer be of and by the people, but rather will be wholly subject to the whims of the stronger labor organizations which will be able to dictate policy through the threat or actuality of the strike. Labor will have its "ultimate weapon", while government will have no countervailing leverage necessary to a balanced

bargaining process. The power inherent in the strike will be the determining factor in deciding how our community and our nation is to run, or if it is to run at all. If this is not the end of democracy and the beginning of totalitarianism, then I do not understand the terms. Society should not and will not sit back and unctiously turn the reins of government over to militant labor leaders who are neither responsible to nor representative of the people.

In short, aside from the fact that the strike is not legal, it is not right. Rather than a means towards solving a problem, it is itself a problem which is greater in dimension than the controversy that spawns it.

Finally, despite everything that has been said, those who espouse strikes will answer that, no matter what happens, there will be strikes. My response to this cannot be directed either to the Court or to my adversary. Rather, I must address the teachers themselves for they are more than educators and public employees. They are citizens with a stake in this nation's life.

The simple fact is that the law, as it stands today, prohibits teachers' strikes. Teachers, no more than any other member of this society, cannot pick and choose which laws they will honor and which they will flaunt. While it has become trite to speak of the rule of law as the cornerstone of American life, there exists the stark reality that only an ordered society can survive. Teachers collectively can disregard the law, can probably escape the consequences since hundreds of teachers cannot be incarcerated, and can blackmail the community into meeting their demands. By so doing, while they may achieve their short-term objectives, they will be destroying our way of life.

Despite the inevitability of chaos in a lawless society, the militants may still be lured by the promise of raw power inherent in the strike. It is a delusion to believe that the end result of illicit collective activities will eventually work to the teachers' advantage. What will occur can best be summed up in a quote by Will Durant:

"When liberty destorys order, the hunger for order destroys liberty."

Society will respond by imposing stern controls under which teachers and the people will all be deprived of the freedom we dearly prize.

The solution lies not in a confrontation but in an equitable partnership between the Board and its employees. The Board must realize that because of anti-strike legislation it has an overt obligation to go beyond mere good faith bargaining to make meaningful concessions towards the teachers and their representatives. The teachers must abandon their blind adherence to anarchy as a means of achieving their just goals. The people have the obligation to devise suitable alternatives to the strike in order to create a balanced bargaining process.

In the meantime, the mere fact that a law will be violated is no reason to abolish that law. On the contrary, this is the time to vindicate that social compact we call the law and to enforce it with all the vitality and vigor which our government possesses.

CODIFICATION -- LAYING A FOUNDATION FOR DEVELOPMENTS IN SCHOOL LAW

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I propose to speak to you tonight about "codification." Most of us, on hearing the word, probably think immediately of a comprehensive statutory statement of the law on a given subject -- in other words, a code. This is one meaning of the word, and I certainly will be talking about creating a code of school law, but in speaking of "codification" this evening I intend to give it also a second, more restrictive definition.

Writing a code covering any field of law may take at least two different courses. It may proceed along the path of a thorough investigation and study of the existing law and practice, considering both local and foreign sources, and case law as well as statutory law. This, to be followed by a thoughtful re-development of policy, taking only what is desirable and useful from the existing law and custom and adding to that new principles, rules, and procedures either to replace the ineffective or undesirable portions of the old system or to cover newly emergent problems or proposals inadequately dealt with by the old system or not dealt with at all. The end result of this process is a written statement of what is believed to be the best practicable system of statutory law concerning the subject field. This process and the code which results are most properly called a law "revision". "Revision", then, means just that -- change, hopefully, for the better.

"Codification", however, in its stricter sense, stops short of change. If properly carried out, it will not alter the status of the law or custom. This second route to a written code begins just as the process of revision -- that is with a detailed investigation and analysis of the existing statutory and case law and current custom. But its goal is simply to restate the law in an improved form, not to devise any new policies. It may involve reorganization of statutes, rewriting of the statutes, and elimination of obsolete, superseded, or unconstitutional statutory provisions, but the resultant code should not alter in any way the legal effect of the preexisting statutory enactments.

In order to determine whether codification is a desirable or even worthwhile procedure, let us look more closely at the process.

As I have already indicated, codification begins with investigation -- a painstaking, exhaustive search for all of the existing enactments, regulations, rulings, and administrative and judicial opinions which establish, implement, or interpret the body of law governing our selected subject field. Such an exhaustive search is demanded by the codifier's First Commandment -- "Thou shalt not change the law." The only way that he can protect his professional soul is to make certain that he has <u>all</u> of the law in his possession before he begins the remolding process, for the sins of omission are as deadly as those of commission.

Assuming that we have decided to undertake a codification of school law for a particular state, just what are we likely to uncover in ferreting out the law -- well, probably more than we bargained for. To begin with, education is one of the primary activities of state government, and the maintenance of our school systems takes the greatest portion of our state and local tax dollar. Knowing this, we may assume that much of our state law will deal with education, and we wouldn't be wrong.

Let me tell you what we accumulated in the course of the Indiana School Law Codification project, which was, in volume, one of the largest codification projects ever undertaken. We began by reading every statute enacted in Indiana from 1816 to 1967. Among them we found 3,900 Acts concerning schools -- elementary, secondary, and college level. Of these, 2,000 were still active, and represented 8,000 sections in the statute books. We discovered that 22% of all legislation enacted in Indiana has concerned schools, and since population has little bearing on the quantity of legislation necessary to establish a school system, it is believed that this proportion is not far out of line with the record in other states.

It should be pointed out that we must include in our collection statutes affecting all public corporations, such as those dealing with political activities of government employees; purchasing of goods from state prisons, limitations on bonded indebtedness, and so forth. While these acts affect school corporations or their employees, few, if any, of their provisions will be incorporated in a school code because they more properly belong in other codes, but we must be aware of them and may have to make allowances for them or references to them in our school code. These are some of the tangled strings on which the codifier must keep a hold.

To aid the interpretation of statutes or to determine the effect of certain statutes, we must look to the case law. In the Indiana project we read and analyzed every opinion of the Supreme and Appellate Courts of Indiana down to June 1, 1968. We also read and analyzed the Indiana Attorney General's Official Opinions to June 1, 1968. Of these, we found 3,200 opinions which affected our project and were incorporated in it.

We also consulted the State Superintendent of Public Instruction as to Regulations and Rules issued by the various divisions under his control. We even obtained copies of forms used in making reports or accountings from local school districts to the state. These were valuable as showing us just what was being done in the day to day business of running the schools. Many ambiguities in the statutes might be resolved by referring to the practical application of the statutes which was being made in the school system.

Of course, amassing all of these materials is only the beginning of the codification process, but perhaps you and I should pause at this point to see whether any appreciable benefit has yet accrued from this initial effort.

At first blush, we will seem only to have filled many file cabinets with paper and loaded many bookshelves with statute books. But we aren't merely pack rats lining our nest with paper baubles; we are purposive investigators with a constructive end in mind. In that role we have accomplished several things important to our goal.

First, we have drawn together at one place and at one time all of the sources of law on our chosen subject. While this situation can be said to exist in a library, it is quite different because we have collected these materials for a definite purpose other than mere availability and we have excluded unrelated materials. Ours has been a purposive, selective effort.

Second, we have had to read most of these materials in order to determine their relevancy and thus have acquired an appreciation of the scope of our whole endeavor and also have gained some familiarity with the law and custom as they currently stand. This latter point is important to the second stage of analysis, where we must deal with the fragmentary elements of the law and yet understand their place in the greater scheme.

Third, we may have made some surprising and important discoveries, or should I say, "rediscoveries." It is not uncommon for statutes to be enacted in response to an immediate need or issue which fades from the public attention with greater or lesser rapidity, and the statute is forgotten with the furor which gave it its impetus. Then, in the cyclic pattern of history, these same or similar issues arise again, and we tend to view them as new phenomena and try to deal with them as requiring novel solutions when there may already exist a useable solution to the question.

We have seen a most significant illustration of this "rediscovery" just this summer. Surely, no one in this country is unaware of the great controversy over civil rights that has so engaged our people and our leaders since the decision in Brown v. Board of Education, 347 U.S. 483 (1954), reawakened the American public to the unequal status of minority segments of our population. This very meeting considered "Trends in School Integration" just yesterday.

In the last few years a very prominent question in the civil rights controversy has been that of the right to buy or rent a home wherever an individual chooses regardless of race, creed, or color -- what has been termed "open housing". This was regarded as a new issue which demanded new legislation in order to guarantee the right to live where one wants. So we witnessed great political battles on the state and local levels in which this became the paramount issue, such as the gubernatorial race in Maryland in 1966, in which Mr. Mahoney campaigned on the principle that "Every man's home is his castle." We also saw mass demonstrations for and against open housing laws, such as Father Groppi's crusade in Milwaukee last summer. In the course of this heated "debate", if we can give it such a respected name, we even saw physical violence occur. All of this turmoil was centered around attempts to gain local, state, or federal open housing legislation.

Then, in June of this year, the Supreme Court of the United States in the case of Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) told us that all of the impassioned rhetoric and violence was unnecessary. Why? Because the Congress had enacted a law in 1866, more than 100 years ago, which settled the question. The Civil Rights Act of 1866 provided that "[a]ll citizens of the United States shall have the same rights, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C.A. § 1982. The Court held that this act prohibits purely private discrimination on the basis of race in the sale of real estate. While this statute had not been totally ignored for 100 years, this was the first case before the Supreme Court to determine its application to purely private discrimination and it was only the first case before the Court involving this statute at all in 20 years. So we see that some lawyer or lawyers who had a well-defined goal, having engaged in thorough research, were able to turn up a little-used statute, give a new interpretation to it, and find at least a partial solution to a burning problem of our time. (It should be noted parenthetically that the Supreme Court did not believe that this 1866 Act made additional open housing laws unnecessary or useless, for they help to implement the earlier statute.)

While the chance of rediscovering an education statute or decision which would have as much impact as this example is minimal, still, we might stumble upon a very helpful act or decision which has been buried in the proliferate product of the legislative mill or judicial arena.

Such are the benefits to be derived from preliminary investigation and collection of source materials.

Now we have arrived at the most tedious, though most revealing, facet of the codifier's work -- examination and analysis of the source materials. It is at this stage of the codifying process that we determine what the law is, which is by no means a simple task.

To begin with, we must (1) establish a methodology whereby to make our analysis and (2) devise a system with which to record and preserve the result. Herein lies much of the tedium. For example, in the Indiana School Law Cofidication we adopted the practice of cutting each statute into pieces which expressed a single idea. Thus, one section of a statute might be divided into several segments, the number depending upon the complexity of the original section. Each of the pieces was put on a separate worksheet, which indicated its source and legislative history. We wound up with over 15,000 worksheets in our files. These worksheets or bits of statutory law, still in their original language, were filed in folders in accordance with a master outline of the proposed Code. In this way, we broke the statutes down into individual ideas which could be rearranged and collated in what we believed to be a more useful and logical format.

Having dissected our statutes and assigned each part to its proper place in the master plan, we are ready to begin the examination of the occupants of each folder where we will find some very complex family trees.

I will use illustrations from the Indiana statutes because of my experience with them, but I am sure that you will be able to think of similar situations in the laws of your own states.

We will first be struck by the inordinate number of identical twins, triplets, sextuplets, and worse. Over and over again we may find statutes stating that: "a township school trustee may pruchase real estate for school purposes;" "the board of trustees of any school township may purchase real estate for school purposes;" "the school board of any fourth class city may purchase real estate for school purposes;" etc., etc. Why can't the legislators be content with producing a single statement on the subject to the effect that "the governing board of any school corporation may purchase real estate for school purposes?" Why do they resort to such redundancy which only clutters up the statute books and sends the governors of the various school corporations to different parts of the statute book to find the same legal authority? This practice creates the illusion that a different practical law is in effect when it is not.

On occasion the legislators realize the unseemly picture of repetition and confusion which they have painted and attempt to paint over the forest of saplings with a single sturdy oak. In 1945, for instance, the Indiana General Assembly adopted an Act which authorized <u>all</u> school corporations to purchase real estate but it did not specifically repeal any of the preceding piecemeal provisions. Acts of 1945, Ch. 257, § 1; Burns § 28-2421. Then in 1967, the General Assembly painted over the oak with a giant Sequoia -- the Indiana General School Powers Act, again providing the authority for school corporations to purchase real estate. Acts of 1967, Ch. 307; Burns § 28-6401 et seq. (1968 Supp.). But again they did not expressly repeal any of the preceding statutes. In fact, the School Powers Act was declared to be only supplemental to existing laws -- one more branch on the already overgrown family tree. To top it off, the Act is not applicable to township school corporations.

In addition to the confusion of identical offspring, we may be plagued with a covey of "kissin' cousins". For instance there is in Indiana a 1917 Act, as amended in 1919, permitting townships to issue both school and civil township bonds to rebuild schoolhouses destroyed by "fire, lightning or windstorm." Acts of 1917, Ch. 174, § 1; Acts of 1919, Ch. 42, § 1; Burns § 28-3103. In 1933 the legislature passed another act covering the rebuilding of schoolhouses by townships, but it covered buildings destroyed by "fire or windstorm." Acts of 1933, Ch. 189, § 1; Burns § 28-3101. What, we may ask, about buildings lost due to lightning? Is the township powerless to replace them, or does the 1917 Act still remain in effect despite the duplication of language? To add further confusion, in 1935, the legislature added a new section to the 1917 Act to permit the issuance of civil township bonds to complete the construction of buildings partially constructed which are being built to replace schoolhouses destroyed by fire, lightning or windstorm. Acts of 1935, Ch. 160, § 1; Burns § 28-3110. So lightning reappears as a culprit.

Another example of the "kissin' cousin" problem is the largely unnecessary repetition of notice provisions in every statute authorizing the issuance of bonds.

The issuance of financing bonds is provided for in nearly every statute covering the purchase of land or buildings or the construction of school buildings, gymnasiums, or other facilities, and in statutes covering the purchase of school buses or the creation of school libraries, and so on and on. And of course it behooves the legislature to tell us what procedure should be followed in the issuance of these various bonds, but somehow the draftsman of every other act feels it necessary to devise his own procedure. It is possible that different procedures would be advisable depending upon the amount of bonds to be issued and the prospective market therefor or even depending upon the organization of the school corporation. However, in Indiana there are in the school laws more than 100 separate provisions for the publication of notice, most of them for the issuance of bonds. One went so far as to require publication in a newspaper in New York City. These requirements are meant to serve the legitimate function of advising the populace that the public debt (and perhaps their tax rate) is going to be increased and of alerting the bond market to the impending issue. But you who are either administrators or legal advisors of school districts know that the needless proliferation of these provisions with miniscule variations only serves to create technical snares in which vital bond issues may be trapped by the ever watchful taxpayers protective associations. It should be noted that all of these notice provisions were in addition to a 1927 act which purported to be a uniform publication of notice statute -- applicable to most government corporations. Acts of 1927, Ch. 96, § 4; Burns § 49-704. We might well applaud the effort of the 1927 legislators to provide order in the midst of chaos, but they were betrayed by their successors. For time and again as new laws were enacted in later years, the draftsmen reverted to their old habits of including a notice provision in their efforts. Here is an example of another forgotten statute, which could save many people like yourselves a lot of headaches.

In examining the school law family tree, we may also find evidence of incest -- that is taking an entire section or sections from one act and copying them into a second act. This can lead to nonsense provisions when done indiscriminately, such as one Indiana statute on annexation by school corporations passed in 1963 which copies a section from a 1961 act on the same subject. Acts of 1961, Ch. 186; Burns § 28-2338 et seq. (1968 Supp.); Acts of 1963, Ch. 296; Burns § 28-6201 et seq. (1968 Supp.). Section 10 of the 1961 act was copied verbatim into Section 8 of the 1963 Act and where the earlier Act referred to Section 9 the later Act also made reference to Section 9, which contained no substantive provision in the second Act.

Again, our examination of the family of school laws will disclose sibling rivalries. Many of the various school corporations will vie for favors or special treatment which only serves to further burgeon the statute books. This is the problem of special legislation. There are many examples of this jockeying for position in the Indiana school laws. There are for instance two statutes authorizing appropriations from the general funds of civil corporations to aid in the improvement of schools which apply to very specific cities and towns. One, as originally enacted, applied to "any city of the fifth class having a population of not less than (3,300) ... and not more the (3,500) ... which owns a municipal utility and has no tax levy for municipal purposes." Acts of 1939, Ch. 67, § 1, amended by Acts of 1943, Ch. 52, § 1; Burns § 28-1440. The other applies to "any civil town ... having a pupulation of not less than (2,100) ... and not more than (2,500) ... which owns a municipal utility and which municipal utility has no outstanding bonded indebtedness." Acts of 1941, Ch. 67, § 1; Burns § 28-1441. Now, just how many cities and towns do you suppose qualify to use these statutes? Obviously, they were intended to apply to only one community. Some of you out there may be mentally protesting that there are legitimate reasons for putting those laws on the books. Some school district needed some immediate help when it was in a financial bind. But to you who may protest the need for these statutes, let me ask whether those same communities still need them or even may use them today, nearly 30 years after their passage. Might they not just be cluttering up the house?

Furthermore, these special statutes often have a very dubious validity, and if attacked by the ever-watchful taxpayer or an adversely affected office-holder, they may prove useless.

In the early 1950's, some of the people in the vicinity of Plainfield, Indiana became dissatisfied with the operation of their schools by the township trustee alone. So they went to the General Assembly in 1953 and got passed an Act which permitted a township having a population of not less than 3,500 in which there was located a town of not less than 2,000, and in which there were township schools operated by a township trustee, which schools served all of the people in the township, to form a new school corporation under the control of a school board. Acts of 1953, Ch. 88, amended by Acts of 1957, Ch. 119; Burns § 28-2455 et seq. This Act was challenged on the grounds that it violated the Indiana Constitutional prohibition against special legislation. It was stipulated that at the time the statute was enacted, there were 1,009 townships in the state, of which 150 had populations of more than 3,500. Of these, 26 contained a town of not less than 2,000 population, and of that number only 3 townships were conducting township schools under a trustee which schools served the entire township. In December of 1954, the Indiana Supreme Court held the statute to be unconstitutional. Bally v. Guilford Twp. School Corp., 123 N.E. 2d 172 (1954). But the school corporation obtained a rehearing, and in April, 1955, the Supreme Court reversed itself and upheld the statute. Bally v. Guilford Twp. School Corp., 126 N.E. 2d 13 (1955). All of which goes to show the unreliability of these statutes to begin with and the often very difficult evaluation of such statutes that a school's attorney -- not to mention the codifier -- may be called upon to make.

There is at least one other problem that may crop up in our school law family just as in any other, and that is the generation gap. With the exception of a few states like Kentucky and Wisconsin which have done continuing revisions of their statutory law, we will find in every state outdated statutes which speak in what are now irrelevant terms. Until 1965, there was in Indiana a statute requiring township trustees to provide covered wagons for the transportation of transferred students to adjoining townships. Acts of 1917, Ch. 49 § 17; repealed

by Acts of 1965, Ch. 260, § 911. There is still on the books a law permitting school corporations to erect buildings in conjunction with the W.P.A. Acts of 1939, Ch. 87, § 2; Burns § 28-3321. Laws such as these should either be repealed or be amended to make them applicable to today's world, unless, of course, we really intend to return to the "good old days."

It seems that our family portrait has turned out to be a study in confusion. And before I discuss the way in which codification helps to return order to the scene, we might look into the why and how we get into these messes.

So far, I seem to have placed most of the blame on the backs of our legislators. But I do not intend to make them the villains of this piece. For, although they have the ultimate responsibility for keeping our statutory house in order, they have many obstacles in their path.

1. They are not professional legislators. They are men from all fields of endeavor who are periodically called together to conduct the legislative business of our states. The farmer or pharmacist who is elected to a legislature is not likely to be familiar with, let alone be an expert on, our whole body of school law.

2. The legislators must work on tight schedules. Many state legislatures do not even meet every year and their sessions are limited in duration. The Indiana General Assembly, for example, meets for 60 days every two years. (I remember a college professor who once said that the legislature would do less harm if it met only 2 days every 60 years.) But even in states with annual legislative sessions, the press of business is great. How then can we expect careful, detailed study of every bill introduced to see how it fits into the existing statutory scheme? There just isn't time.

3. Few legislatures give their members help in drafting bills. In Indiana, many bills are written by tired representatives in their hotel rooms late at night. How polished an instrument can we expect?

4. The individual legislators try to do their best for their constituencies. If a county superintendent of schools says that he urgently needs a special statute to permit some new program or avoid some impending catastrophe, his representative will probably try to get it for him -- perhaps without really understanding it. And, of course, there are the organized lobbyists at work as well.

But these factors alone do not account for the proliferation of school law. Part of the responsibility must be assumed by the educational establishment itself. It is they who send out the call for most of this legislation. They give impetus to the special legislation and to much of the duplicative and kissin' cousin legislation. The reason for the former is special problems or projects requiring new legislative grants of authority. The reason for the latter, however, appears to be in part, a kind of timidity or insecurity. This is the fear of relying on existing laws which could be construed to permit the implementation of new proposals. Instead, the administrators seek the security of a new, tailor-made statute in which to dress their projects. This insecurity may be found in the chaotic status of the law itself or in the fear of controversy and even litigation brought on by the ever-present opposition forces in the community.

An additional and perhaps the most significant factor in the proliferation of education statutes is the state policy of keeping a tight hold on the school system. Everywhere, we see a reticence of the legislatures to give the local school districts anything approaching a carte blanche to run the schools as their governing bodies see fit.

So far, I have taken you through the investigation stage of codification in which we amassed our raw materials and the analysis stage in which we sorted the materials and made our first blueprint, and I have introduced you to the evaluation stage where the codifier attempts to determine the legal meaning and effect of a statute. Here is where we really determine, if possible, what the law is. It is at this stage that the codifier looks into questions of constitutionality, both state and federal, such as the constitutionality of the very limited special legislation I mentioned earlier or of a statute like an old Indiana Act whose application depends in part upon the maintenance of separate schools for Negro children. Acts of 1941, Ch. 119, § 1; Burns § 28-3326. The codifier tries to decide the effect on an earlier statute of a later statute covering all or part of the same subject matter -- this is the problem of implied repeals or supersessions. He considers the viability of the old statutes which appear at first reading to be obsolete. He examines the statutes for contradictions or inconsistencies within themselves or with other statutes, and tries to determine the effect of each. And he must ponder the meaning of differing terminology in use over the years to see whether there is any real difference. It is at this stage that the codifier refers to the judicial and administrative decisions which he has collected and consults with the professionals in the field who administer the law.

Unfortunately, many of the questions which the codifier raises cannot be conclusively answered. When this is so, he can only go ahead, leaving the various possibilities of result open for future determination by the legislature or the courts. But even this dubious result of his work is not without value, for he can now bring these specific questions to the attention of the legislature.

Now that we have looked at the condition of school law in most states and looked at some of the reasons for how and why it got that way, we should be ready to consider how codification of this far less than perfect law can improve the situation. We have come at last to the main point of this presentation -- "Laying a Foundation for Progress in School Law."

So far we have done little more than reveal the extent and nature of the statutory malaise, which we must have believed existed in the first place or else we wouldn't have undertaken our codification project. But now that the codifier has dissected and examined the problem he can begin to reconstruct. He has reached the drafting stage. It is here that he will lay that foundation about which I have been talking.

Just how will the codifier go about solving the problems he has uncovered?

As for the duplicative statutes, he will combine their various repetitive provisions into single statements of the same principles. I personally have drafted parts of as many as 15 statutes into one short section of the proposed Indiana School Code. The same thing will be done with the kissin' cousin statutes so far as possible. The generation gap will be closed by adopting a modern terminology where possible and omitting obsolete provisions entirely. Other provisions will be dropped as unconstitutional, superseded, or impliedly repealed. In this way the gross bulk of statutory material is greatly pared.

But codification accomplishes more than the elimination of surplusage in our statutes. It should also achieve a reduction in complexity and obscuration. For example, we have all read the page-long, single-sentence paragraph which appears so frequently in our statutes. This is often nearly incomprehensible even after many readings, and, if amended, requires substantial reprinting with

great danger of misprinting. In the proposed Indiana School Code we attempted to make each statutory section a simple statement of a single idea or several interrelated ideas. This increases the number of sections but it facilitates understanding and simplifies amendment.

To further enhance comprehension, we adopted standard definitions for frequently used words and uniform terminology in place of variant usages, such as "pupil", "scholar", and "student". And last, but not least significant, we completely rearranged the sections according to what we hope is a more logical and useful organization than presently is used. All of the property provisions, for example, have been put in a separate Title which is broken down into Chapters dealing with Acquisition of Property, Disposition of Property, Use of School Property for Non-school Purposes, etc. This reorganization is expected to aid school administrators and school attorneys in locating the law on a particular point.

It is hoped that the new organization and uniform terminology will also be heeded by the legislative draftsman, so that future acts will comport with the Code terminology and be fitted into the appropriate places in the Code organization, thus helping to avoid gradual recreation of the old chaos. The legislative draftsman also will be better able to evaluate the need for new legislation and the requisite scope for that legislation when the existing law is easy to find and understand. Thus will the codifier restore some semblance of order to existing school law. And this is vital to orderly development of school law thereafter.

But what of the future? A "codification" is after all a restatement of the existing law. The codifier has been bound throughout by the Fundamental Tenet: "Thou shalt not change the law." How then has he laid the foundation for development in school law?

That question has already been answered by what I have said this evening. Let me sum it up.

First, a codification draws into focus the present legal status of our school system, so that we can tell how far we must yet travel to attain our goals of educational excellence and in what direction we must move.

Second, and this is really part of the first point, a codification exposes to open view the weaknesses in our present legal structure so that we can take the measures to correct them before we build still more upon them.

Third, and this follows from the second point, by pointing up the areas of school law which are badly in need of reform, a codification can be a stimulus to that reform; and

Fourth, it provides us with a blueprint for future growth, so that we can build in an orderly fashion and not keep tacking on haphazard additions.

I will conclude by considering a question which is left over from the beginning of this little talk. You will recall that I mentioned two possible routes to obtaining a written code, one was codification and the other was revision. Revision does not require us to make the same agonizing determinations as to obsolesence, supersession, etc. because we do not have to worry about changing the law -- that is our very purpose. On the positive side, we will draft into the new code all of the changes and reforms for which codification can only show the need. And we can make the same improvements in organization and style of legislative drafting. On balance, then, revision is capable of accomplishing more than strict codification.

But we must also consider the probability of accomplishment. Ultimately the codifier's or revisor's work must be presented to the legislature for adoption, and the prospects of success for each may be different. Depending upon the attitudes of the legislators and the public, as well as the relative unanimity of the educational establishment in its support for the new code, it might be easier to get enacted a code which makes no substantive changes in the law than one which upsets the status quo and perhaps a few applecarts. Half a loaf may be better than none.

Ladies and gentlemen, codification can lay a foundation for progress in school law, but it can do no more than that. No code of law, no matter how enlightened, can or should remain static. As our society grows and changes, the law must grow and change with it, and it is people like yourselves, truly concerned about the future development of our education system and working together through organizations such as this one, who must provide the talent, purpose, and ideas by which a greater educational edifice will be built.